

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No 543.

THE UNITED STATES, APPELLANT,

vs.

THE RIO GRANDE DAM AND IRRIGATION COMPANY
AND THE RIO GRANDE IRRIGATION AND LAND COM-
PANY, LIMITED.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

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1 In the supreme court of the Territory of New Mexico. July term, 1897.

Be it remembered that there was filed in the office of the clerk of the supreme court of the Territory of New Mexico, on August 9th, A. D. 1897, a stipulation, which said stipulation is in the words and figures following, to wit:

UNITED STATES OF AMERICA, APPELLANT, }
vs.
 RIO GRANDE DAM AND IRRIGATION CO. }
 and the Rio Grande Irrigation & Land }
 Co. (Limited), appellees. }

Stipulation.

It is hereby stipulated and agreed by the appellant, by W. B. Childers, United States attorney for New Mexico, and the appellees, by Albert B. Fall, of their solicitors, that the appeal sued out in the above-entitled cause may be docketed at the present term, July, 1897, of the supreme court of the Territory of New Mexico and set down for hearing by the court at said term and heard as if the said appeal had been granted more than thirty days before the beginning of the said term and had been regularly returnable thereto under the statute.

It is further stipulated and agreed that upon the hearing of said cause the original papers may be forwarded by the clerk of the district court of the third judicial district to the clerk of the supreme court of the Territory and used upon the hearing in said court without the same being printed, provided the court will consent thereto; said papers to be returned to the said district court after copies of the same have been made for the purpose of completing the record in said supreme court.

W. B. CHILDERS,
U. S. Atty. & Solicitor for Appellant.

W. H. POPE.

ALBERT B. FALL,
Solicitor for Appellees.

[Endorsement.]

No. 753.

Supreme court, Territory of N. Mex. July term, 1897.

UNITED STATES }
vs.
 RIO GRANDE DAM & IRRIGATION CO. ET AL. }

Stipulation.

Filed in my office this 9th day of Aug't, 1897.

GEO. L. WYLLYS, *Clerk.*

3 And afterward, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, New Mexico, the seat of government of said Territory, on the last Monday of July, A. D. 1897, the same being Monday, July 26th, 1897, and on the thirteenth day of said term, the same being Monday, August 9th, 1897, the following, among other proceedings, were had, to wit:

4 In the supreme court of the Territory of New Mexico. July term,
A. D. 1897.

UNITED STATES OF AMERICA, APPELLANTS,
vs.
THE RIO GRANDE DAM AND IRRIGATION COMPANY, }
appellees.

Stipulation having been entered into in this cause by and between the parties thereto by their respective counsel, that the appeal taken in said cause may be docketed and heard at the present term of this court to the same effect as if the same had been sued out more than thirty days prior to the first day of the term, and said stipulation having been submitted to the court.

It is hereby ordered that said cause be docketed and set for hearing on the twentieth day of August, A. D. 1897.

It is further ordered that the filing of the transcript of the record required by the statutes and the rules of the court be dispensed with, and that the clerk of the district court of the third judicial district be, and he is hereby, ordered to certify and return to the clerk of this court all the original papers in said cause now on file in his office with all convenient speed, said papers to be used upon the hearing of said cause in lieu of a certified transcript thereof.

It is further ordered that after the hearing of said cause a copy of said papers and record be prepared and certified and left on file with the clerk of this court as the record in said cause, and that the original papers hereafter be returned to the clerk of the said district court.

It is further ordered that the printing of the record in said cause be dispensed with.

5 [Endorsement.]

No. 753.

Supreme court, Territory of N. M. July term, 1897.

UNITED STATES
vs.
RIO GRANDE DAM AND IRRIGATION CO. ET AL. }

Order.

Filed in my office this Aug. 9th, 1897.

GEO. L. WYLLYS.

And afterwards, to wit, on August 17th, 1897, at the said regular term of said supreme court, the following, among other proceedings, were had, to wit:

THE UNITED STATES OF AMERICA, APPELLANT, } No. 753. Appeal
vs. } from the third
RIO GRANDE DAM AND IRRIGATION COMPANY, ET } judicial dis-
al., appellees. } trict court.

On motion of appellant by W. B. Childers, esq., it is ordered that this cause be set for hearing on Monday, August 23rd, 1897.

6 And afterwards, to wit, on August 23rd, 1897, there was filed in the office of the clerk of the said supreme court a transcript, which said transcript is in the words and figures following, to wit:

IN THE SUPREME COURT
OF NEW MEXICO.

JULY TERM, A. D. 1897.

No. —

UNITED STATES OF AMERICA,
Appellant,

vs.

THE RIO GRANDE DAM & IRRIGATION CO. ET AL.,
Appellees.

United States of America, }
Territory of New Mexico, }

In the District Court of the Third Judicial District of
the Territory of New Mexico, for the trial of
causes arising under the laws of the United
States.

*To the Honorable Gideon D. Bantz, Associate Justice
of the Supreme Court of the Territory of New
Mexico, and Judge of the Third Judicial District
Court thereof:*

The United States of America, by Joseph McKenna,
their attorney general, and William B. Childers, United
States attorney for the Territory of New Mexico, bring

this, their bill of complaint against The Rio Grande Dam & Irrigation Company, a corporation duly organized under and in pursuance of the laws of the Territory of New Mexico, and having its principal place of business in the town of Las Cruces, County of Doña Ana, in said Territory.

1. And thereupon your orators, complaining, say that the defendant, the said The Rio Grande Dam & Irrigation Company, had and has for the objects and purposes of its incorporation, the construction and maintenance of dams and reservoirs, and canals, ditches and pipe-lines to the extent of from fifty miles to five thousand miles in the Territory of New Mexico; and for the purpose of supplying water to be accumulated in practically illimitable quantity in said dams and reservoirs, canals, ditches and pipe-lines, it was and is the object and purpose of the said defendant company to construct and build dams across the Rio Grande river in the Territory of New Mexico at such certain points in the said river in said Territory, that may be necessary to carry out the objects and purposes of said incorporation.

2. Your orators show that section 10 of the Act of Congress of September 19th, 1890, (26 Stat. 454) is as follows, to-wit:

"That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect to which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves and similar structures, erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate

the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court; the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States."

And that Section 3 of the Act approved July 13, 1892 (27 Stat. 110) is as follows, to-wit:

"That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, break-water, bulkhead, jetty or structure of any kind outside of established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said water; it shall not be lawful hereafter to commence the construction of any bridge, bridge-draw, bridge piers and abutments, cause-way, or other works over or in any port, road, road-stead, haven, harbor, navigable river, or navigable waters of the United States, under any act of the legislative assembly of any state, until the location and plan of such bridge or other works have been submitted and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, road-stead, haven, harbor, harbor of refuge, or inclosure within the limits of any break-water, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War: *Provided*, That this section shall not apply to any bridge, bridge-draw, bridge piers and abutments, the construction of which has heretofore been duly authorized by law, or be so construed as to

authorize the construction of any bridge, draw-bridge, bridge piers and abutments, or other works under the act of the legislature of any state over or in any stream, port, roadstead, haven or harbor or other navigable water not wholly within the limits of such state."

3. Your orators further show and complain, that the said defendant company are particularly and immediately about to commence and to create, and intend and threaten to commence and create, an unlawful obstruction in the said Rio Grande river by constructing a dam in and across said river at a point called Elephant Butte, in the Territory of New Mexico and in the Third Judicial District thereof, the same being one hundred and twenty-five miles north and slightly west of the city of El Paso, in the state of Texas, for the purpose of storing water in a large quantity to carry out the purposes of said incorporation, as before in this bill mentioned.

4. Your orators further show, that the said Rio Grande river from and including the site of the proposed said dam and construction by the said defendant company, has been used to float logs for commercial and business purposes and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas, in the United States of America, and the Republic of Mexico; that the first material addition to the volume of water of the said Rio Grande river is at a point three hundred and twenty-five miles below the site of the said proposed dam and construction by said defendant company, where the Rio de los Conchos, or Conchos river, empties into said Rio Grande river; and that the said Rio Grande river is a navigable stream and used as such in interstate commerce, from the mouth of said Conchos river, in the Republic of Mexico, to the City of El

Paso, State of Texas, in the United States of America, a distance of two hundred miles.

5. And further, that the navigability of the said Rio Grande river at the City of El Paso aforesaid, has been recognized and acknowledged heretofore by the Congress of the United States and Secretary of War of the United States.

6. And further, that the said Rio Grande river, from the City of El Paso aforesaid up to and beyond the site of the dam proposed and threatened to be commenced and constructed by the said defendant company, as aforesaid, carries a greater quantity of water than it carries at the said City of El Paso, and by reason of the conformation of the bed and banks, and the channel thereof, makes navigation of such last mentioned portion of said river, a feasible accomplishment.

7. And further, that such proposed dam will be such a one as will check the flow of water in the said Rio Grande river at the said point of Elephant Butte entirely for a greater portion, if not the entire year, and impound it; and that such distribution of the waters of said river from within said proposed dam at said Elephant Butte, as contemplated, intended, threatened, and about to be attempted, commenced, begun and created, and constructed by said defendant company, as aforesaid, will practically destroy the said river as a stream for many miles below said point at said Elephant Butte, and the volume of the water below said proposed dam so diminished by the construction and uses thereof as aforesaid, as to materially effect the navigability of said Rio Grande River, and impair navigation and commerce throughout its entire course from said proposed dam at Elephant Butte to the Gulf of Mexico.

8. And further, that the creation of an obstruction to the navigable capacity of said river, by the building of said proposed dam, as above described, by the defendant company, is not affirmatively authorized by law, nor has any such authorization been given.

9. And further, that the proposed building and construction of the said proposed dam by said defendant company is without the permission, authority or approval of the Secretary of War of the United States.

10. Your orators complaining, show further, that the said defendant company, by means in part of said dam, to be constructed as aforesaid, proposes to create the largest artificial lake in the world, to obtain control of the entire flow of the Rio Grande river in the southern part of the Territory of New Mexico, hereinbefore described, the same being the only practical river for irrigating said portion of said territory; by controlling said river, as aforesaid, to control to a great extent the irrigable land adjacent thereto in said district and territory; to subject the owners of irrigable lands therein to a perpetual water rent; to obtain possession, by means of the practically exclusive power of water rights in a partially arid region of the United States, of large tracts of irrigable land in said portion of said territory; to secure a monopoly of all the water suitable for irrigation in said territory contiguous to the said river below the site of said proposed dam.

Your orators therefore pray, that the said defendant may be compelled to answer all and singular, the premises in this bill (but not under oath, the answer under oath being hereby expressly waived, and that the defendant, The Rio Grande Dam & Irrigation Company may be restrained from beginning, commencing and attempting, building, constructing,

creating or maintaining any dam, break-water, weir, structure or obstruction of any character whatsoever across the Rio Grande river in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte, or at any point thereon in said judicial district, or in any manner, to begin the construction of, or to construct or create any structure, dam, or other obstruction of any character whatsoever, in such manner and to such extent as shall effect the navigable capacity of said Rio Grande river in said Territory of New Mexico. Your orators pray, that your Honor may grant a writ of injunction, issuing out of and under the seal of this Honorable court, perpetually enjoining and restraining the said defendant, The Rio Grande Dam & Irrigation Company, its employes and agents, or any one under its authority, for or by them, from any, or further, creating, constructing or maintaining or beginning the construction of any obstruction to the navigability of the waters of said river by any of the means in this bill and in this section hereinbefore set forth.

And your orators further pray, that a provisional or preliminary injunction be issued, restraining the said defendant, The Rio Grande Dam & Irrigation Company, from the beginning, commencement, attempting, building, creating, obstructing or maintaining any obstruction to the navigability of said waters of and across the said Rio Grande river, and in the said waters thereof, in said Territory, by any of the means heretofore mentioned in this bill, to-wit: by means of a dam, break-water, weir, piles, structure or other obstruction.

And for such other and further relief as the circumstances, nature and equity of the case may require, and to your Honor shall seem meet.

Therefore, that your Honor will grant unto your orators, the writ of subpoena in chancery issuing out of and under the seal of this court, to be directed to the said The Rio Grande Dam & Irrigation Company, commanding it to appear on Monday, the 7th day of June, A. D. 1897, before your Honor, in the court aforesaid, then and there to show cause, if any it have, why a perpetual injunction should not be issued against it in this behalf as prayed for in this bill, and then and there answer the premises and abide the order and decree of the court.

JOSEPH MCKENNA,

Attorney General of the United States.

By direction of the Attorney General.

W. B. CHILDERS,

United States Attorney for New Mexico.

GEO. P. MONEY,

Assistant United States Attorney for New Mexico.

Territory of New Mexico, }
County of Bernalillo. } ss.

I have read the foregoing petition, by me subscribed, and the facts stated therein are true to the best of my information and belief.

GEO. P. MONEY,

Assistant United States Attorney for New Mexico.

Subscribed and sworn to before me this the 22nd day of May, A. D. 1897.

[SEAL]

E. L. MEDLER,

Notary Public.

Upon the filing and reading of the foregoing bill of complaint, in the foregoing cause, it is ordered that a temporary writ of injunction issue against the defendant, The Rio Grande Dam & Irrigation Company, as prayed for in said bill, and it is further ordered that

said defendant show cause, if any it have, before me in chambers, on Monday, the 14th day of June, 1897, why said injunction should not be continued in force until the final hearing of the cause, or should be dissolved.

GIDEON D. BANTZ,

Judge.

Done in chambers, this the 24th day of May, A. D. 1897.

In the United States District Court of the Third Judicial District of the Territory of New Mexico:

The United States of America,	}	Chancery.
No. 140. vs.		
The Rio Grande Dam & Irriga-		
tion Company.		

Upon the filing and reading of the bill of complaint in this cause, it is ordered that a temporary writ of injunction issue against the defendant, The Rio Grande Dam & Irrigation Company, as prayed for in said bill, and it is further ordered that said defendant show cause, if any it have, before me in chambers, on Monday, the 14th day of June, 1897, why said injunction should not be continued in force until the final hearing of this cause, or should be dissolved.

GIDEON D. BANTZ,

Judge.

Done in chambers this, the 24th day of May, A. D. 1897.

United States of America,	}
Territory of New Mexico,	
Third Judicial District.	

I, W. B. Walton, clerk of the District Court of the Third Judicial District of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and correct copy of the order granting a temporary

ary injunction and ordering the defendant to show cause why it should not be continued in force, made and entered of record in the above entitled cause.

[SEAL]

Witness my hand and the seal of said Third Judicial District Court, at Silver City, New Mexico, this 25th day of May, A. D. 1897.

W. B. WALTON,
Clerk.

Territory of New Mexico, }
County of Doña Ana. }

Within order to show cause came to hand May 30th, 1897, and was duly executed by me on the 31st day of May, 1897, by delivering a true and correct copy hereof to Phœbus Freudenthal, at his place of business at Las Cruces, in said county and territory, the said Phœbus Freudenthal, being one of the directors of The Rio Grande Dam & Irrigation Company, the within named defendants, and the only officer of said company to be found in Doña Ana county.

E. L. HALL,
Marshal.

By E. E. BANNER,
Deputy.

The United States of America,
To The Rio Grande Dam & Irrigation Company,
Greeting:

You are hereby commanded: That, laying all other matters and things aside, you do cause an appearance to be entered for you in the United States District Court of the Third Judicial District of the Territory of New Mexico, in chancery sitting, on the first return day occurring not less than twenty

days after service hereof, if the defendant served is a resident of said judicial district, or on the first return day occurring not less than thirty days after service hereof, if the defendant served is not a resident of said judicial district, then and there to answer unto a bill filed against you by the United States of America, and that you do answer concerning such things as shall then and there be alleged against you, and observe what the said court shall direct in this behalf, on pain of such process of contempt as said court shall award; the first Monday in each month being a return day, and each defendant being required to enter an appearance in the office of the clerk of said court on or before the return day on which this writ is returnable; otherwise the bill herein may be taken pro confesso.

Witness the Hon. Gideon D. Bantz,
Associate Justice of the Supreme
Court of the Territory of New
Mexico, and presiding judge of
the Third Judicial District Courts
thereof, and the seal of said court
at Silver City, New Mexico, this
25th day of May, A. D., 1897.

[SEAL.]

W. B. WALTON,
Clerk and register.

This is a suit in chancery commenced by complainant against defendant, praying that the said defendant may be restrained from beginning, commencing and attempting, building, constructing, creating or maintaining any dam, break-water, weir, structure or obstruction of any character whatsoever, across the Rio Grande river in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte or any point thereon, in said judicial district, or in any man-

ner to begin the construction of or to construct or create any structure, dam, or other obstruction of any character whatsoever, in such manner and to such extent as shall affect the navigable capacity of said Rio Grande River in said Territory of New Mexico; complainant also prays for perpetual injunction, enjoining and restraining defendant, its employes and agents or any one under its authority, for or by them, from any or further creating, constructing or maintaining, or beginning the construction of any obstruction to the navigability of the water of said river by any of the means in said bill set forth; complainants also pray for a provisional or temporary injunction restraining defendant from the beginning, commencement, attempting, building, creating or obstructing or maintaining any obstructions to the navigability of said waters of and across the said Rio Grande river, and in the said waters thereof, in said Territory, by any of the means hereinbefore mentioned, for general relief.

[SEAL]

W. B. WALTON.

Clerk and register.

Territory of New Mexico, {
County of Doña Ana. }

Within writ came to hand May 30th, 1897, and was duly executed by me on the 31st day of May, 1897, by delivering a true and correct copy hereof to Phœbus Freudenthal at his place of business at Las Cruces in said county and territory, the said Phœbus Freudenthal being one of the directors of the Rio Grande Dam & Irrigation Company, the within named defendants, and the only officer of said company to be found in Doña Ana county.

E. L. HALL,

Marshal.

By E. E. BANNER.

The United States of America.

*To the Rio Grande Dam & Irrigation Company,
Greeting:*

Whereas, the United States of America have filed their certain bill in chancery in the United States District Court of the Third Judicial District of the Territory of New Mexico, against you, the said The Rio Grande Dam & Irrigation Company, your employes and agent, or any one under your authority, defendants to be relieved touching the matters therein complained of and which said bill is still there pending.

We therefore, in consideration of the premises and of the particular matters in said bill set forth, do strictly enjoin and command you, the said The Rio Grande Dam & Irrigation Company, your employes and agents, or any one under your authority, and each and every one of you, under the penalty of the law thence ensuing, that you and every one of you, do absolutely desist and refrain from beginning, commencing, attempting, building, constructing, creating or maintaing any dam, break-water, weir, structure, or obstruction of any character whatsoever, across the Rio Grande river in the waters thereof, in the Territory of New Mexico, and especially at Elephant Butte or at any point thereon in said judicial district, or in any manner to begin the construction of, or to construct or create any structure, dam, or other obstruction of any character whatsoever, in such manner and to such extent as shall affect the navigable capacity of said Rio

Grande River in said Territory of New Mexico, until the further order of this court.

Witness the Hon. Gedeon D. Bantz,
Associate Justice of the Supreme
Court of the Territory of New
Mexico, and presiding Judge of
the Third Judicial District Courts
thereof, and the seal of said court
at Silver City, New Mexico, this
25th day of May, A. D. 1897.

W. B. WALTON,
Clerk and register.

Territory of New Mexico, }
County of Doña Ana. }

Within writ of injunction came to hand May, 30th, 1897, and was duly executed by me on the 31st day of May, 1897, by delivering a true and correct copy hereof to Phoebus Freudenthal at his place of business at Las Cruces, in said county and territory, the said Phoebus Freudenthal being one of the directors of The Rio Grande Dam & Irrigation Co., the within named defendants, and the only officer of said company to be found in Doña Ana county.

E. L. HALL,
Marshal.

By E. E. BANNER,
Deputy.

United States of America, }
Territory of New Mexico. }

In the District Court of the Third Judicial District of
the Territory of New Mexico, for the trial of causes
arising under the laws of the United States.

*To the Honorable Gideon D. Bantz, Associate Justice
of the Supreme Court of the Territory of New*

*Mexico, and Judge of the Third Judicial District
Court thereof:*

1. The United States of America, by Joseph McKenna, their Attorney General, and William B. Childers, United States Attorney for the Territory of New Mexico, bring this their amended bill of complaint, by leave of the court, against the Rio Grande Dam & Irrigation Company, a corporation duly organized under and in pursuance of the laws of the Territory of New Mexico, and having its principal place of business in the town of Las Cruces, county of Doña Ana in said Territory; and the Rio Grande Irrigation and Land Company, Limited, a corporation organized under and by virtue of the laws of Great Britain, having its principal office in the city of London, England, and also being engaged in doing business in the said Territory of New Mexico. Thereupon the complainant alleges and says that the original defendant, the said Rio Grande Dam & Irrigation Company, is incorporated under the laws of the Territory of New Mexico, and has for the object and purposes of its incorporation as such has proposed the construction and maintainance of dams, reservoirs, ditches, canals and pipe lines.

2. The complainant further alleges, as it is informed and believes that the said original defendant intends and gives out, that it will construct from fifty to five thousand miles of canals, ditches, and pipe lines in said Territory of New Mexico, state of Texas, and Republic of Mexico, as set forth in its articles of incorporation, and that in pursuance of the purposes of incorporation it gives out that it is about to construct dams across the Rio Grande in the Territory of New Mexico, at such certain points in said river in said Territory as may be necessary to carry out the said objects and purposes of

this incorporation and proposes to accumulate and impound waters from said river in unlimited quantities in said dams and reservoirs, and distribute the same through said canals, ditches and pipe lines.

3. The complainant further alleges that it is informed and believes that the defendant, the Rio Grande Irrigation and Land Company, Limited, was organized under the laws of Great Britain as an adjunct and agent of the original defendant, the Rio Grande Dam & Irrigation Company, and for the purpose of securing capital for promoting the construction of said dams, reservoirs, canals, ditches and pipe lines, and that the said original defendant, the Rio Grande Dam & Irrigation Company, has entered into a contract or agreement for the conveyance to its co-defendant hereinafter designated as the English Company, of some rights in and to said dams, reservoirs, canals, ditches and pipe lines to be constructed as aforesaid, or for the conveyance of their rights in and to said dams, reservoirs, ditches, canals and pipe lines, the exact language and purport and legal effect of which said contracts, agreement or conveyances are unknown to complainant. The complainant further alleges that it is informed that the same is of record in the office of the probate clerk, ex-officio recorder of the county of Sierra and Territory of New Mexico, a copy of which it asks leave to file herewith and make a part of this amended bill, as soon as the same can be procured, to be marked "Exhibit A."

4. The complainant further alleges, upon information and belief, that the said defendant, the Rio Grande Irrigation and Land Company, Limited, as agent, lessee, assignee, or under whatever relation may exist between it and the said original defendant, as

hereinbefore alleged, has attempted to exercise and has claimed the right to exercise all the rights, privileges and franchises of the said original defendant, and has given out as its objects as said agent, lessee, or assignee, as aforesaid, to construct said dams, reservoirs, ditches and pipe lines and take and impound the water of said river, and thereby to create the largest artificial lake in the world and to obtain control of the entire flow of the said Rio Grande and divert and use the same for the purposes of irrigating large bodies of land, and to supply water for cities and towns, and for domestic and municipal purposes, and for milling and mechanical power.

5. The complainant further alleges that the Rio Grande receives no addition to its volume of water between the projected dam and the mouth of the Conchos river, about three hundred miles below, and that the said Rio Grande, from the point of said projected dam to the mouth of the Conchos river, throughout almost its entire course from the latter part to its mouth, flows through an exceedingly porous soil and that the atmosphere of the section of the country through which said river flows, from the point above the dam to the Gulf of Mexico, is so dry that the evaporation proceeds with great rapidity and that the impounding of the waters will greatly increase the evaporation, and that from these causes but little water, after it is distributed over the surface of the earth, would be returned to the river.

6. The complainant further alleges that said river is navigable and has been navigated by steamboats up to the town of Roma, in the state of Texas, about three hundred and fifty miles from its mouth, and is susceptible of navigation and has been navigated above Roma to a point about one hundred and fifty miles below El

Paso, in the state of Texas. The complainant further alleges that the navigability of said river is interfered with at the last mentioned point by some falls or rapids, and that the said river above said falls or rapids is susceptible of navigation up to La Joya in the Territory of New Mexico, about one hundred miles above Elephant Butte, where defendants propose to construct said dam; and said complainant further alleges that the said river between said rapids and said town of La Joya, has at different times been used for the purposes of floating and transporting rafts, logs and poles, and that the said portion of said stream is susceptible of being used and navigated for commercial purposes. And the complainant further alleges that the said river is navigable and susceptible of being navigated as aforesaid, for carrying on commerce between the Territory of New Mexico, the state of Texas, and the Republic of Mexico.

7. The complainant further alleges that the impounding of the waters of said river by the construction of said dam and reservoir at said point, called Elephant Butte, about one hundred and twenty-five miles above the City of El Paso, said point being in the Territory of New Mexico, and the diversion of the said waters and the use of the same for the purposes hereinbefore mentioned, will so deplete and prevent the flow of the water through the channel of said river below said dam, when so constructed, as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth.

8. Complainant further alleges that the construction of said dam has never been affirmatively authorized by law, and the plans and specifications for the construc-

tion of the same have not been submitted to the Secretary of War for his approval, and the location and plans have not been submitted and approved by him; and the complainant further alleges that no dam, or other obstruction to the navigable capacity of any waters can be lawfully constructed, until the same have first been affirmatively authorized by law, and until the location and plans for such obstruction, have been submitted and approved by the Secretary of War.

9. The complainant further alleges that the navigability of the said Rio Grande at the City of El Paso, state of Texas, has been recognized and acknowledged by the Congress of the United States and the Secretary of War of the United States.

The complainant further alleges that by the treaty, the Government of the United States of America and the Republic of Mexico, have, by treaty stipulation, agreed and declared that the Rio Grande from the southern boundary of the Territory of New Mexico to its mouth, shall be free and common to the vessels and citizens of both countries, and that neither country shall without the consent of the other, construct any work that may impede or interrupt, in whole, or in part, the exercise of said right of free navigation, and that neither party of said treaty have consented or authorized the construction of said dam.

Complainant files herewith the articles of incorporation of said original defendant as a part of this bill of complaints, marked "Exhibit B."

Wherefore the complainant being remediless except in a court of equity, where such matters are remedial, the complainant prays that a subpoena in chancery be directed to said defendants, the Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and

Land Company, Limited, requiring them to be and appear before this Honorable court at a time and place to be therein named, to answer all and singular the premises but not under oath (answers under oath being hereby expressly waived), and that the said defendants, the Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, may be restrained from beginning and commencing or attempting to construct or build said dam and reservoir or any other dam, breakwater, reservoir or other structure or obstruction of any character whatsoever across the Rio Grande or the waters thereof, or from maintaining such dam or obstruction in the Territory of New Mexico, and especially at Elephant Butte, in said Territory, or any other point on said river in said Territory of New Mexico, as shall effect the navigable capacity of said Rio Grande at any point throughout its course, whether in the Territory of New Mexico or elsewhere. And that the temporary injunction heretofore granted against said original defendant be continued.

And the complainant prays that it shall have such other and further relief in the premises as equity may require and to your Honor shall seem meet.

The complainant further prays that a temporary injunction be issued and directed to the said defendants, The Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, restraining and enjoining them and each of them from beginning, commencing and attempting to construct or build said dam and reservoir or any other dam, breakwater, reservoir or other structure or obstruction of any character whatsoever across the Rio Grande or the waters thereof, or from maintaining such dam or ob-

struction in the Territory of New Mexico, and especially at Elephant Butte, in said Territory, or any other point on the line of said river in said Territory of New Mexico, as shall effect the navigable capacity of said Rio Grande, at the further orders of this Honorable court, and that upon the final hearing of this cause that said injunction shall be perpetual.

JOSEPH McKENNA,

Attorney general of the United States.

W. B. CHILDERS,

United States attorney for the Territory of New Mexico.

In the District Court of the Third Judicial District of
The Territory of New Mexico.

United States of America, }
Complainant. }

No. — vs.

The Rio Grande Dam & Irrigation Company, et al. }
Defendants. }

Affidavit of W. B. Childers, United States Attorney.

Territory of New Mexico, }
County of Bernalillo. } ss.

William B. Childers, of lawful age, being duly sworn, upon oath, deposes and says: That he is United States Attorney for the Territory of New Mexico; that under instructions from the Attorney General of the United States, he communicated by letter with the defendant, The Rio Grande Dam & Irrigation Company, at Las Cruces, New Mexico, stating to them that he, affiant, had been instructed to prevent said company from erecting a dam across the Rio Grande, at a place called Elephant Butte, in the Territory of New Mexico, about one hundred and twenty-five miles above El Paso, and that it had been reported that said company was about to commence work, and requested an answer to his com-

munication. A few days afterwards the defendant company wired affiant, that it did propose to commence the erection of said dam at said point. Thereupon, affiant instructed George P. Money, Assistant United States Attorney, to file suit to enjoin the construction of said dam and reservoir; whereupon the original bill in this cause was filed. Affiant further says, that he is officially informed, and believes that the erection of said dam and reservoir has not been authorized by the Secretary of War, and that the same is not affirmatively authorized by law.

Affiant further states, that from his knowledge of geography and information acquired from books of reference and official reports made by officials of the Government of the United States, that the said Rio Grande is a navigable stream for a considerable distance above its mouth, and therefore states positively that such is the fact.

Affiant further states, that from documentary evidence on file in the department of state at Washington, copies of which have been furnished him, that the said river is susceptible of navigation and has been navigated to a point about one hundred and fifty miles below El Paso, in the state of Texas, as alleged in the amended bill of complaint filed in this cause. Affiant further states, that he has been reliably informed and believes that said river has been used above said point in the past for the purpose of floating logs down the stream to the city of El Paso, and that he is also informed and believes that said river has been recently so used for floating telegraph poles for a short distance a little below the town of La Joya, which is situated on said river in the county of Socorro, New Mexico.

Affiant further states, that from an examination of

the reports of W. W. Follett, engineer of the International Water Boundary Commission, organized pursuant to treaty between the government of the United States and the Republic of Mexico, that the amount of water in said river has been greatly depleted and diminished within the past ten or twelve years by reason of the diversion for the purpose of irrigation by ditches and otherwise of large amounts of water in Colorado and New Mexico above the point where the said defendant company proposes to construct the said dam; that said depletion and diminution has seriously effected the navigable capacity of the said river at said point called Elephant Butte and below there.

Affiant further states, that upon the hearing on the rule to show cause why the temporary injunction issued in this cause should not be continued, he will present in support of this affidavit, the original, or copies properly certified, of the documents above referred to, together with others to sustain the allegations made upon information and belief in this case.

Affiant further says, that from an examination of the certified copies of the articles of incorporation of said Rio Grande Dam & Irrigation Company, which said certified copy he proposes to present upon said hearing, he is informed and believes that the purposes of the said defendant company, are to construct said dam and a line of ditches and canals and pipe lines, to begin at the dam or dams to be built by said company across the Rio Grande river at a place, or various and several places, within township thirteen (13) and fourteen (14) and ranges three (3) and four (4) west, in Sierra county, New Mexico, and to terminate at any point or place and various and several places, in the Territory of New Mexico, state of Texas, and Republic of Mexico, to

which it may be practicable to carry the waters so accumulated, and that the length of said canals and ditches to be from fifty miles to five thousand miles.

Affiant further states, that the Rio Grande Irrigation and Land Company, Limited, made a co-defendant by the amended bill filed in this case, as he is informed and believes, has the contract-relation set up and alleged in the amended bill filed in this case with the said original defendant, The Rio Grande Dam & Irrigation Company, and was organized for the purpose of constructing or promoting the construction of said improvements above described, either by actually constructing the same or by raising the necessary capital therefor; and that said company, according to the prospectus issued by it, was formed to acquire by lease and assignment, the franchises, rights, water rights, and rights to appropriate the waters of the Rio Grande, contracts, purposes and undertakings of the said defendant, The Rio Grande Dam & Irrigation Company, and for the purpose of irrigating, colonizing and improving the lands in the Rio Grande Valley between Engle, New Mexico, and Fort Quitman, Texas, and affiant files herewith and makes a part of this affidavit a copy of the prospectus issued by said defendant, the Rio Grande Irrigation and Land Company, Limited.

Affiant further states, that by the terms of an Act of Congress passed on the 6th day of September, A. D. 1888, and of an Act of Congress approved July 28th, 1882, the Rio Grande was treated and recognized as a navigable stream at the city of El Paso in the state of Texas, and that the Secretary of War has recognized it as a navigable stream, and so treats it, and has requested the Department of Justice to take such proceedings as

may be necessary to prevent the construction of said dam and reservoir.

WILLIAM B. CHILDERS.

Subscribed and sworn to before me this the 19th day of June, A. D. 1897.

[SEAL] E. L. MEDLER,
Notary Public, Bernalillo County,
New Mexico.

Private and Confidential.

Sufficient of this issue having been guaranteed, the directors will proceed to allotment on or before the day of April, 1896.

**RIO GRANDE IRRIGATION AND LAND
COMPANY, LIMITED.**

Incorporated under the Companies Acts, 1862 to 1893,
by which the liability of the Share-
holders is limited.

CAPITAL - - - £500,000.

In 100,000 8 per cent. Cumulative Preference Shares
of £1 each, and 400,000 Ordinary
Shares of £1 each.

Issue of £100,000 in 8 per cent. Cumulative Preference
Shares of £1 each, and £100,000 in Or-
dinary Shares of £1 each.

Payable 2s. 6d. on Application; 7s. 6d. on Allotment;
and the balance as required.

The Preference Share issue is preferential both as to Capital and Dividend, and after 8 per cent. has been paid on the Ordinary Shares, ranks *pari passu* Share for Share with the Ordinary Shares in the surplus annual profits.

Issue of 1,000 First Mortgage Debentures of £50 each,
(Part of Authorized Issue of £100,000,)

Bearing Interest at Five (5) per cent. per annum, payable Half-yearly on the 1st day of January and the 1st day of July in each year. Redeemable at £55 on the 1st of January, 1916, or previously on six months' notice.

The Debentures are offered at £52 10s. per £50 Debenture Bond, payable as follows:—

£5 on Application.	£10 3 months after allotment.
5 on Allotment.	25 6 months after allotment.
7-10-0 1 month after allotment.	
	<u>£52-10-0</u>

The Debentures will be secured by a Trust Deed creating a First Mortgage in favour of the Trustee for the Debenture Holders on—First: Certain exclusive privileges and franchises, granted by the Government of the United States of America, for the creation of Dams, Weirs, Ditch Heads, Canals, and other works in connection with Irrigation and Right of Appropriating the Waters of the Rio Grande. Second: The Dams, Weirs, Ditch Heads, Canals and Reservoirs and other Irrigation Works to be constructed. In addition thereto, Debenture Holders will further be secured by a Floating Charge created by the said Trust Deed on all the other assets of the Company, both present and future, including; (a) the Lands which shall hereafter be acquired in exchange for Water Rights, the Plant and Contracts, and the unsold Water Rights for the time being; (b) The Income derived from Water Rents and other sources.

In the Trust Deed, provision will be made for a

sinking fund sufficient to redeem the Debentures at maturity, or whenever prior thereto they may be paid off as provided in the said Trust Deed; and a sum adequate for the payment of interest for two years from January 1st, 1896, a period deemed fully ample for construction, *will be invested in Consols by the Vendor Company*, in the name of the Trustee for the Debenture Holders.

TRUSTEE FOR THE DEBENTURE HOLDERS.

THE NATIONAL SAFE DEPOSIT COMPANY,
LIMITED,

MARQUIS OF TWEEDDALE, (*Chairman.*)

1, Queen Victoria Street, Mansion House, London,
E. C.

DIRECTORS.

The Right Hon. The Earl of Winchilsea and Nottingham, Haverholme Priory, Sleaford.

The Right Hon. Lord Clanmorris, Bangor Castle, Belfast.

Lord Ernest W. Hamilton, Coates Castle, Pulborough, Sussex.

Robert J. Price, M. P., 104, Sloane Street, S. W.

Colonel W. J. Engledue, Petersham Place, Byfleet, (late R. E. & late an Engineer-in-Chief & Manager Indian State Rys.)

John Ferguson, 14, St. George's Square, S. W. (Ramage & Ferguson, Ltd.) Shipowner & Shipbuilder, Leith.

*Nathan E. Boyd, Kilmarnock House, Kenley, Surrey (President, Mesilla Valley Irrigation Colony, New Mexico.)

*R. Chetham-Strode, Fairholme, Pinner, Middlesex.

*Shareholders in and representing the Vendor Company.

LOCAL DIRECTORS.

The Hon. W. T. Thornton (Governor of New Mexico).

Edwin C. Roberts (Director, the Rio Grande Dam & Irrigation Company, U. S. A.)

Joshua S. Reynolds (President, First National Bank, El Paso, Texas.)

John M. Yair (Director, Mesilla Valley Fruit and Vine Growing Company, Limited).

Henry D. Bowman (Bowman & Sons, Bankers, Las Cruces, N. M.).

BANKERS.

The Royal Bank of Scotland, St. Andrew Square, Edinburgh; 123, Bishopsgate Street Within, London, E. C.; and branches. (*For the Company.*)

Messrs. Brown, Janson & Co., 32, Abchurch Lane, London, E. C. (*For the Trustee.*)

LOCAL BANKERS.

First National Bank, El Paso, Texas.

Bowman & Sons, Las Cruces, New Mexico.

BROKERS.

Messrs. R. B. Smith & Co., 10, Throgmorton Avenue, and Stock Exchange, London, E. C.

Mr. J. Souter Sanderson, 10a, North. St. David Street, and Stock Exchange, Edinburgh.

Mr. Douglas Cairney, 45, West Nile Street, and Stock Exchange, Glasgow.

Messrs. Marsland & Chew, 4, St. Ann's Square, and Stock Exchange, Manchester.

Messrs. Godfrey & Laws, 12, Mount Stuart Square, Cardiff.

AUDITORS.

Messrs. Ford, Rhodes & Ford, 81, Cannon Street,
London, E. C.

ENGINEER.

John L. Campbell, C. E.

SOLICITORS (*to the Company.*)

Messrs. Nicholson, Graham & Graham, 24, Coleman Street, London, E. C.

Messrs. Davis, Beall & Kemp, El Paso, Texas, U. S. A.

SOLICITORS (*to the Vendor Company.*)

Messrs. Minet, Pering, Smith & Co., 81, Cannon Street, London, E. C.

SOLICITORS (*to the Trustee.*)

Messrs. Ashurst, Morris, Crisp & Co., 17, Throgmorton Avenue, London, E. C.

REGISTERED OFFICE OF THE COMPANY.

34, Victoria Street, Westminster.

SECRETARY (*pro tem.*)

N. P. Allison.

25-3-96.

 PROSPECTUS.

This Company has been formed to acquire, by lease and assignment, the Franchise Rights, Water Rights, Right of Appropriating the Waters of the Rio Grande (U. S. A.), Contracts, Properties, and Undertaking of the Rio Grande Dam & Irrigation Company, and for the purposes of irrigating, colonizing, and improving the lands in the famous Rio Grande Valley, between Engle, New Mexico, and Fort Quitman, Texas.

The Vendor Company was incorporated in 1893, under the Laws of New Mexico, U. S. A., to construct irrigation works, and consolidate, under one Corporate Body, certain irrigation rights and interests, in the Rio Grande Valley, in Southern New Mexico and El Paso County, Texas.

In the Rio Grande Valley the inexhaustible fertility of the soil, the capabilities for irrigating with the fertilising waters of the Rio Grande—the Nile of America—combined with the exceptionally fine climate, so peculiarly adapted to fruit and vine culture, and the superior railway facilities (five important railways centre in this valley at El Paso), present unequaled advantages for profitable fruit farming and vine growing.

Fruit Farmers and Vine Growers in the Rio Grande Valley are about 1,200 miles nearer than the California Growers to Chicago and the Eastern Markets, and fruit grown in the Rio Grande Valley matures several weeks earlier.

The soil is alluvial, and analysis shows it to be admirably suited to the production of all kinds of fruits, cereals, and vegetables. Under irrigation phenomenal crops are obtained, the rich chocolate loam affording a yield remarkable both for quantity and quality.

The Rio Grande Valley has been pronounced by French experts to have few rivals as a fruit, raisin, and wine-producing country, and is now recognized by eminent European and American medical authorities as a most favoured sanitarium for those suffering from pulmonary and throat troubles. "Almost perpetual sunshine, cool summers, warm winters—average 63 degrees—considerable elevation—altitude

from 3,500 to 4,000 feet – and a dry aseptic atmosphere.”

The completion of the Company's system of canals will bring 230,000 acres of valley lands under ditch, and by the construction of the high level canal, about 300,000 acres of magnificent mesa (low lying table lands) can be irrigated (*vide* Engineer's Report).

The amount of fertile alluvial lands capable of being irrigated by the Company's canals, when completed, is only limited by the flow of the Rio Grande, which is one of the largest of the American rivers. Though the greatest flow of the river occurs during the months of April, May, June and July, just when the orchards and vineyards most require irrigation, the storage of water is necessitated because the minimum flow of the river generally occurs about the end of the cropping season, when some irrigation is still requisite, and because an adequate supply of water must also be insured for irrigation in the early spring, when the river is low.

The Vendor Company has secured, under United States Federal Law, the only feasible reservoir site on the Rio Grande, in Southern New Mexico, and the completion of the storage dam at Elephant Butte, *will create the largest artificial lake in the world*, (11,036,722,000 cubic feet) at a cost of 4s. 9d. per acre foot (capacity), as compared with the cost of the Sweetwater dam (California) £8 10s. 5d. per acre foot, the Merced Valley Dam (California) £5 10s. 10d., Castlewood Dam (Colorado) £7 10s. 4d. per acre foot. *Vide* the Engineer's Report.

In acquiring this splendid natural reservoir site the Company will *obtain control of the entire flow of the Rio Grande in Southern New Mexico*; the only prac-

tical means of irrigating what is now considered to be the finest fruit and vine country in the United States.

In controlling the water the Company will, to a great extent, control the irrigable lands.

Many of the owners of irrigable lands in the Valley have already contracted to convey to the Vendor Company, *one-half of their lands* in return for Water Rights to the other half, and to pay a Water Rent of \$1.50, (6s.) per acre per annum for every acre of their land irrigated. A Water Right is the perpetual right to the use of water for irrigation purposes, at a fixed annual rental per acre irrigated, and is inalienable from the land to which the Water Right pertains.

Obviously the remaining landowners must, in order to render their properties of value, concede a large portion of their lands for Water Rights, or purchase the said Water Rights at the ruling rate, from the Company.

By exchanging Water Rights for lands it is estimated that the Company will obtain in fee simple within two years not less than 40,000 acres of irrigable valley lands; and by constructing the proposed high level canal quite two-thirds of the vast mesa lands can be secured by the Company from the Government, and Ranch Owners, upon even more advantageous terms.

The mesa lands, like the valley lands, are alluvial deposits, level, clear, and ready for the plough, equally as suitable for Fruit and Vine Culture as the Valley, but on a higher level than the valley lands proper.

The 40,000 acres of Valley Land, if sold, with Water Rights, as low as £10 per acre, will return the Company £400,000. California Irrigable lands sell for £20, £50 and £100 per acre; and the Mesilla Valley

Irrigation Colony, located on the Rio Grande in the Mesilla Valley, a sub-division of the Rio Grande valley to be irrigated from the Company's Canals, is rapidly selling its lands at £20 per acre and upwards.

The revenue of the Company will be derived principally from the sale of Lands and Water Rights, from Water Rents; from the supplying of water to cities and towns for domestic and municipal purposes; and for milling and mechanical power, for which there is a large and constantly increasing demand.

Within the district to be irrigated from the Company's Canals, and covered by the Vendor Company's Franchise, over 48,000 acres of valley lands have *already* been brought under ditch. At \$1.50 (6s.) per acre per annum (the minimum rate) these lands alone will give an income of £15,000 per annum.

After the completion of the Dam, Weirs, and Main Canal, the Company does not intend selling Water Rights under £10 per acre, and Water Rents, under Water Rights, sold after the 1st day of January, 1897, will, in all probability, be raised to not less than 10s. per acre per annum. Under the Sweetwater Irrigation System (California), the annual Water Rent is \$3.50 (14s.) per acre, and lands *with* Water Rights are sold for £40 per acre more than lands *without* Water Rights. (*Vide* Californian State Engineer's Official Report.)

When the whole of the proposed irrigation works are carried out, over 230,000 acres of valley lands, and about 300,000 acres of mesa lands will be under ditch. Say 50,000 acres pay an annual Water Rent of \$1.50 (6s.) per acre, and the remainder, \$2.50 (10s.) per acre. and allowing that two-thirds *only* of the above acreage be irrigated in any one year, the Company will

derive an annual income from *Water Rents* alone of £175,000.

An average of £10 per acre for *Water Rights* will give the Company from the sale of *Water Rights* to, say, 300,000 acres—£3,000,000. The net return per acre will in all probability be much higher, as many landowners are at present unable to pay cash, and are giving one-half their lands for *Water Rights* to the other half. These lands should be readily saleable at from £20 to £50 per acre as soon as under ditch.

The whole of the *Irrigation Works* of the Company are, by Law, *exempt from taxation for six years*.

The property and enterprise, and the cost of building the Canals, and a solid Masonry (Stone and Concrete) Dam, have been exhaustively investigated and reported upon by the Company's Engineer, a thoroughly competent authority in irrigation and hydraulic matters.

The Engineer's estimates for construction (allowing for contingencies, see report) are as follows:—Main Dam at Elephant Butte, £52,398 19s. 2d.; Dam No. 2 (weir, ditch head), £5,807 1s. 8d.; Dam No. 4 (ditch head), £4,095 6s. 3d.; Distributary Canals for Irrigation from Main Dam to lower end of Mesilla Valley (see map) £73,605 4s. 2d.

Tenders have been received by the Vendor Company from reliable and well-known contractors, which show that the main portion of the works (the portion tendered for) can be executed, according to specification, at a price well within the Engineer's estimate.

The statements herein are based upon reports made by Colonel Anson Mills, United States Army (who was specially deputed by the United States Government to study the project of damming the Rio Grande) Major J. W. Powell, late Director of the United States (Gov-

ernment) Geological Survey; John F. Wielandy (late Secretary Missouri State Board of Agriculture); Professor Hiram Hadley, A. M., President of the (Government) College of Agriculture, Las Cruces, Rio Grande Valley, New Mexico; John L. Campbell, C. E., E. V. Berrien, Esq., and others.

The price to be paid to the Vendor Company for its Franchise, Property, Rights, Privileges, Land and Water Contracts, &c., has been fixed at £326,500, payable, £26,500 in Cash, and £300,000 in fully-paid up Ordinary Shares (out of which the Vendor invests £5,000 in Consols, for payment of interests on Debentures during construction). The Vendor Company will also be paid the premiums received on the present issue of Debentures. The Vendor Company will pay all the expenses of the formation and promotion of the Company up to the first general allotment, and reserves the right to subscribe for any portion of the Share Capital for the time being not subscribed at a premium of $\frac{1}{8}$ th per Share.

The only contract to which the Company is a party is between the Vendor Company of the one part, and the Company of the other part, and dated the 12th day of February, 1896, relative to the acquirement of the Vendor Company's Rights and Undertaking. The Vendor Company has entered into contracts and arrangements, to which the Company is not a party, in respect of the formation of the Company and the guaranteeing of a portion of its Capital, which may be contracts within the meaning of Section 38 of the Companies Act, 1867, and applications for Shares will be received only on the understanding that the applicants waive the specification of the dates of, and the names of the parties to, such contracts and arrangements, and waive any

further compliance with the said section other than herein contained.

Applications for Debentures and Shares must be made on the accompanying forms, and lodged with the amount payable on application with the Company's Bankers.

If no allotment is made the deposit will be returned in full, and should the number of Debentures or Shares allotted be less than the number applied for, the surplus will be credited in reduction of the amount payable on allotment.

The Debentures may (with interest to date) be exchanged at any time at £55 each, for lands with Water Rights (if any remain unsold) belonging to the Company, at the price at which its lands with Water Rights are then offered for sale.

The Memorandum and Articles of Association of the Company, the Contract above referred to, and a copy of the Debenture Form and Trust Deed, &c., may be seen on application to the Solicitors of the Company, 24, Coleman Street, E. C., and the Reports, Maps, Plans, &c., may be seen on application at the Office of the Company, 34, Victoria Street, Westminster, S. W.

**Memorandum of Association of the Rio Grande
Irrigation and Land Company, Limited.**

1. The name of the company is "The Rio Grande Irrigation and Land Company, Limited."

2. The registered office of the company will be situate in England.

3. The objects for which the company is established are:

(i.) To purchase, lease, obtain concessions of, or otherwise acquire lands and hereditaments of any tenure, or to obtain any interest in any lands or hereditaments in the Territory (or State) of New Mexico,

United States of America, or elsewhere; and to work, manage, and develop the same in such manner as the company shall think fit, and in particular to build dams, weirs, canals, sluices, acequias, ditches, culverts, filter beds, pipes, aqueducts, and other irrigation works, either for irrigation or other purposes, and to execute and do all other works necessary or convenient for obtaining, storing, impounding, selling, delivering, distributing and measuring water for irrigating the lands of the Company, or for the sale and distribution of water to owners or occupiers of lands not belonging to the Company, and for the sale of water rights, and for carrying on the business of an Irrigation and Waterworks Company in all its branches. To erect, improve and maintain piers, warehouses, factories, foundries, wharves, dwelling-houses, and such other premises, buildings, mills, machinery and plant, and to construct such roads, railways, tramways, waterworks, reservoirs, telegraph, water, gas, electric, and power supply works, shops, stores, drainage, sanitary, and other works and conveniences as may seem calculated, directly or indirectly, to advance the Company's interests.

(ii) To supply water to cities and towns, and others for irrigation, domestic and municipal purposes, and for milling and mechanical power. To irrigate, colonize, cultivate, improve, develop, and otherwise turn to account, the resources of any lands, estates, or other properties, that may be acquired by the Company, and for such purpose to purchase such horses, mules, cattle, stock, and implements, as may be necessary for cultivating, clearing, planting, farming, and pasturing the lands of the Company, and from time to time to sell all or any part of the live or dead stock, and the produce of the said lands. To carry on the business of

general merchants, manufacturers, planters, farmers, and cultivators of the soil in all its branches. To grow trees and vines, and deal in agricultural produce and timber. To grow, purchase, or sell grapes, oranges, lemons, and other fruits, and to manufacture, purchase, or sell wines, spirits, barrels, casks, jars, bottles, and other vessels. To erect and carry on fruit and vegetable canning, drying and evaporating works in all their branches. Also to carry on the business of breeding, importing, and exporting sheep, cattle and horses, or any other business, trade or undertaking, the carrying on of which may be deemed by the Company conducive to the development of its property, or interest therein. To do all acts conducive to promote the colonization and settlement of the lands of the Company, and in particular by the establishment of towns, villages and settlements, and the erection of schools, churches, hotels, and such other institutions as may be calculated directly or indirectly to improve or advance the prosperity of the settlers on the lands of the Company.

(iii) To advance and lend money to settlers, colonists, and others, with or without security, and generally to transact all kinds of banking and general agency business in respect of agricultural, commercial, mining, or financial matters, and to guarantee the performance of contracts by customers of, and persons having dealings, with the company.

(iv.) To amalgamate, unite, or co-operate with any other company or association now or hereafter to be established for or engaged in or having objects or undertakings similar or analogous to those of this Company. To make or carry into effect working or other agreements with any other company, authority,

firm, or individuals, for sharing in profits, for their co-operation in or for the establishment and for the attainment of any of the objects herein, and also to acquire or participate in, by taking shares or otherwise, the goodwill, property, and assets of any company established for any of the purposes herein mentioned, also to promote or establish any Company for the purpose of acquiring the whole or any part of the property of this Company, or for carrying on its business.

(v.) To purchase for investment or resale and generally to traffic in land and house and other property of any tenure, and any interest therein, and to create, sell, and deal in freehold and leasehold ground-rents, and to make advances upon the security of land, fruit-farms, and vineyards, or house or other property, or any interest therein, and generally to deal in, and traffic, by way of sale, lease, exchange or otherwise, with land and house property, and any other property, whether real or personal.

(vi.) To buy, sell, import, export, manipulate, prepare for market, and deal in merchandise of all kinds, and generally to carry on business as merchants, importers, and exporters.

(vii.) To borrow, raise or secure the payment of money in such manner and on such terms as may seem expedient, and in particular by debentures, debenture stock, or mortgages, whether perpetual or redeemable, at a premium or otherwise, and charged or not charged upon the whole or any part of the property of the Company, both present and future, including its uncalled capital.

(viii.) To draw, accept, endorse, and make, discount, execute, use and issue, promissory notes, bills of exchange, bills of lading, warrants, debentures, debent-

ture bonds, and other negotiable or transferable instruments.

(ix.) To apply to the Government or Legislature of the Territory (or State) of New Mexico, State of Texas, *Mexican State of Chichuahua*, or to the Federal Authorities of the United States of America, or Republic of Mexico, or to any other authority, for any Charters, grants, concessions, irrigating, mining or other privileges or authorities for the better enabling the Company to carry out the objects of the Company.

(x.) To enter into any arrangements with any government or authorities, whether supreme, municipal, local, or otherwise, that may seem conducive to the business or objects of the Company, and to carry out and comply with any such arrangements.

(xi.) To sell, lease, exchange, or otherwise deal with or dispose of the whole or any part of the undertaking, rights, or privileges or the lands and hereditaments, plant, machinery, and buildings of the Company, or any interest therein, for such consideration as the Company may think fit, and, in particular, for shares, debentures, or securities of any other Company, having objects altogether or in part similar to those of this Company, or carrying on any business which this Company is authorized to carry on.

(xii.) To distribute among its members in kind or in specie any property of the Company, or any proceeds of sale or disposal of any property of the Company, but so that no distribution, amounting to a reduction of capital, be made, except with the sanction (if any) for the time being required by law.

(xiii.) To tender for, purchase, or acquire from liquidators, trustees, or other persons, the assets or estates of any insolvent or other corporations, companies,

associations, firms, or persons, and for the purposes of giving effect to and realizing the benefit of any such acquisition, to carry on and conduct any business comprised in any such estate or assets, whether such business is or is not expressly included among the objects of the Company as defined by this Memorandum of Association.

(xiv.) To remunerate by way of allowance of brokerage or commission, or in any other manner, any person or persons for services rendered, or to be rendered, or for assisting to place any shares of the Company's capital, or any debentures, debenture stock, or other securities of the Company, including all commissions or other remuneration to brokers and other persons, for procuring or obtaining settlements and quotations upon London or Provincial, or Foreign Exchanges, of the said share or debenture capital, or of the share or debenture capital of any business undertaken by the Company, and to make donations to such persons, either of cash or other assets, as the Directors of the Company may determine to be directly or indirectly conducive to any of the objects of the Company, or otherwise expedient.

(xv.) To obtain any provisional order, license, authorization, or Act of Parliament, or other legislative authority, for enabling the Company to carry any of its objects into effect, or for effecting any modification of the Company's constitution, and to oppose any applications to Parliament or any other Legislative Authorities which may seem calculated directly or indirectly to be prejudicial to the interest of the Company.

(xvi.) To make all deposits of money or securities and do all things necessary for the compliance with the laws and regulations of any Government in any

place where the business of the Company may for the time being be carried on, and for such purpose, if necessary, to conduct its business through any subsidiary Company, and to do all acts necessary to procure the Company to be duly constituted according to the laws of any State or Territory in the United States of America, or Republic of Mexico.

(xvii.) To invest and deal with the moneys of the Company upon such security and in such manner as the Directors of the Company may from time to time think fit.

(xviii.) To issue any shares of the Company at such times, and in such manner, and either at par or at a premium, or as fully, or in part paid up, and generally upon such terms and conditions in every respect as the Board of the Company shall deem expedient.

(xix.) To support or subscribe to any charitable or public body or works, and to give pensions, gratuities, donations, and emoluments to any persons employed by or rendering service to the Company.

(xx.) To exercise the powers given by the Companies Seals' Act, 1864, in any case in which the Company, or the Board thereof, shall deem it necessary so to do, for the purpose of more properly or effectually carrying on the business of the Company.

(xxi.) To do all or any of the above things either as principals, agents, contractors, trustees, or otherwise, and by or through trustees, agents or otherwise, and either alone or in conjunction with others.

(xxii.) To alter this Memorandum of Association in such particular as may be deemed to be desirable, and to make by-laws, rules and regulations for the management of the Company or otherwise.

(xxiii.) To do all such other things as may be inci-

dental or conducive to the attainment of all or any of the above objects.

4. The liability of the members is limited.

5. The capital of the Company is £500,000, divided into 100,000 cumulative preference shares of £1 each, to be numbered 8 to 100,007 inclusive, and 400,000 ordinary shares of £1 each with power to increase. Any shares of the original capital and any new shares from time to time to be created, may (but subject always and without prejudice to the rights of the holders of the original preference shares) from time to time be issued with any such guarantee or any such right of preference, whether in respect of dividend or repayment of capital, or both or any such other special privilege or advantage over any shares previously issued, or then about to be issued, or at such a premium, or with such deferred rights as compared with any shares previously issued, or then about to be issued, or subject to any such conditions or provisions, as the Company may from time to time by special resolution determine. But no such issue shall be made without the consent in writing of the holders, for the time being, of at least three-fourths of any previous issue of shares which will be thereby affected.

6. Before payment of any dividend on, or making any distribution of profits in respect of the ordinary shares, there shall be set aside out of the net profits of the company such sum or sums as the directors from time to time in their absolute discretion think proper, as a reserve fund to meet contingencies, or for equalizing dividends, or for providing for the redemption of the debentures of the company (if any), or for repairing or maintaining any property of the company, or for such other purposes as the directors shall think con-

ducive to the interests of the company. Such fund shall be applied for the purposes for which the same shall have been set aside, as and when the directors shall determine. Subject thereto such fund shall belong:

(a) To such preference shares as may, for the time being, be preferential as to dividends and capital to the extent of the dividends, if any, unpaid and to the extent of the amount per share, for the time being paid up on such preference shares.

(b) To the ordinary shares and others, if any, to the extent of the amount per share paid up on such shares. If any surplus the original preference shares and ordinary shares (except as may hereafter be provided with the sanction of an extraordinary resolution as defined by section 129 of the "Companies Act," 1862, passed at separate general meetings of the members of each class) shall rank *pari passu* share for share.

7. The net annual profits of the company, after the deductions aforesaid, as provided for by clause 6 hereof, shall be applied and dealt with as follows:

(a) There shall first be paid thereout any dividend which under the terms of the issue of any shares, as provided in clause 5 hereof, may be payable in priority to the dividends payable on any other shares of the Company.

(b) Subject to such sums (if any) as may be payable under the above sub-section there shall be paid out of the net profits in each year to the holders of the original cumulative preference shares of the Company, a dividend at the rate of 8 per cent. per annum on the amounts for the time being paid up thereon. But should the net profits in any one year be insufficient, after providing for a Reserve Fund as specified in clause 6 hereof, to pay, on the said original cumulative pref-

erence shares, a dividend at the said rate of 8 per cent. per annum, the directors shall pay on the said shares such a dividend as the net profits in that year will provide, any deficiency in the dividend of the preceding year or years, to become payable and be paid out of the profits of the next and subsequent years.

(c) Subject to sub-sections (a) and (b) of this clause, the net profits in each year, after paying in full a dividend at the rate of 8 per cent. per annum on the amounts for the time being paid up on the original cumulative preference shares, and after paying a dividend of 8 per cent. per annum on the amounts for the time being paid up on the ordinary shares, shall become divisible *pro rata* among the holders of the original cumulative preference shares and the holders of the ordinary shares, and on becoming divisible, shall be so divided among them according to the amount of shares held by them and in proportion to the amounts for the time being paid up thereon.

(Endorsement.)

ISSUE OF

£100,000 in 8 per cent. Cumulative Preference Shares,
£100,000 in Ordinary Shares,

AND

£50,000 in 5 per cent. First Mortgage Debentures.

THE

RIO GRANDE IRRIGATION AND LAND COMPANY, LIMITED.

CAPITAL, - - - £500,000.

PROSPECTUS.

In the District Court of the Third Judicial District of New Mexico, for the trial of causes arising under the laws of the United States.

Joint and several pleas and answer of the Rio Grande Dam & Irrigation Company, and The Rio Grande Irrigation and Land Company, Limited, to the bill of complaint of the United States of America,

To the Honorable Gideon D. Bantz, Associate Justice of the Supreme Court of the Territory of New Mexico, and Judge of the Third Judicial District Courts thereof:

PLEA.

These defendants by protestation, not confessing or acknowledging the matters and things in and by said bill set forth and alleged to be true, in such manner and form, as the same are thereby and therein set forth and alleged, for plea to paragraph eight of said bill, and to so much of said bill as alleges a ground for the relief sought, that the proposed construction of the dam and reservoir of defendants at Elephant Butte, New Mexico, has never been affirmatively authorized by law, and that such cannot lawfully be made, until the plans of same have been submitted to and approved by the Secretary of War; and to the prayer of relief based on such and similar allegations, these defendants say:

That the site of its proposed construction of the said dam and reservoir at Elephant Butte, in the Territory of New Mexico, and of all and singular its proposed construction of dam and reservoirs is, and are in the Territory of New Mexico, and within the arid region of the United States.

And defendants further say, that by the Acts of, the Congress of the United States, of October 2nd,

1888, and August 30th, 1890, and subsequent similar legislation, it is provided by law among other things for the survey and segregation of lands for reservoir sites in the said arid region by the officers of the Geological survey and the Honorable Secretary of the Interior; that under said Acts of Congress and the rules and regulations adopted thereunder, no restriction whatsoever is or has been placed or named as to the stream or streams whether navigable or non-navigable upon which such reservoir sites might be and have been surveyed and segregated; that under said Acts of Congress the Rio Grande river in the Territory of New Mexico from the northern boundary of said Territory to its southern boundary, has been surveyed under the direction of the Secretary of the Interior and a large number of reservoir sites selected thereon and upon the tributaries thereof; that divers such reservoir sites so surveyed and selected, and among others, reservoir sites numbers Thirty-Eight and Thirty-Nine have been approved and reserved by the Secretary of the Interior acting in accordance with the laws of the United States; that the said reservoir site number Thirty-eight, within the Territory of New Mexico, is situated a short distance above Elephant Butte in Sierra county, New Mexico, and that the said reservoir site number Thirty-nine is situated at or near Palomas, in said county and Territory, some distance below said Elephant Butte; that the lands embraced within said reservoir sites last named and other such sites within the Territory of New Mexico, have as aforesaid been segregated and reserved by the Honorable Secretary of the Interior, the said sites numbers Thirty-eight and Thirty-nine upon November 14th, 1891; that such reservation and segre-

gation of all such sites, including sites numbers Thirty-eight and Thirty-nine, have been recognized and affirmed by various Acts of Congress from August 30th, 1890, down to and including the Act of February 26th, 1897, by which said last mentioned Act, it is provided that all such sites heretofore and hereafter to be approved, should be thrown open to corporate and private entry under the Act of March 3rd, 1891; and that such approval of such reservoir sites by the Congress of the United States and such provisions for the entry of the same by private and corporate parties, are without any reservations or restrictions whatsoever as to the navigability or non-navigability of the streams upon which the same are situated; that upon June 18th, 1897, in accordance with the provisions of the Act of February 26th of the same year, the defendant, The Rio Grande Dam & Irrigation Company has made application in the proper manner for the said reservoir sites numbers Thirty-eight and Thirty-nine, respectively, which said application is now pending.

And for a further plea defendants say, that the defendant The Rio Grande Dam & Irrigation Company is properly organized and doing business under the laws of the said Territory of New Mexico and has complied with all the laws of said Territory in reference to the construction of dams and reservoirs and the diversion of waters of public streams of said Territory, and that having complied with said laws the said defendant is authorized thereunder to construct its dams and reservoirs in the Rio Grande river in said Territory, and divert the waters thereof; and the defendants further say that the said Rio Grande Dam & Irrigation Company having first complied with the local laws, rules and regulations, made and

filed its articles of incorporation and proof of its organization with the Secretary of the Interior, and made its application for its dam and reservoir at Elephant Butte, the construction of which is here sought to be restrained, before the land office at Las Cruces, New Mexico, and that such application and the map and survey of such dam and reservoir has a long time prior hereto and prior to the filing of the bill of complaint herein, been approved by the Secretary of the Interior of the United States, and is yet so approved, and the construction of said dam and reservoir duly authorized under the provisions of an Act of Congress of March 3rd, 1891, under which said Act application for such right to construct such dam and reservoir, was duly made as aforesaid.

And defendants ask, that the various reports of the Geological survey of the United States, and of the Secretary of the Interior, showing such surveys of the Rio Grande river, together with the maps of the various reservoirs and land segregated under authority of law, as well as a certified copy of the map of the survey of the Elephant Butte reservoir, duly approved under the authority of Congress by the Honorable Secretary of the Interior, and herewith offered in evidence, may be made a part of this plea.

All of which matters and things these defendants do aver to be true, and that pleading said statutes, and under said statutes and the acts of the Honorable Secretary of the Interior in bar to the plaintiff's bill, or to so much thereof as hereinbefore particularly mentioned, and pray judgment of this Honorable court, whether they should be compelled to make any other or further answer to the said bill, or to so much thereof as is hereinbefore pleaded to, and pray to be hence

dismissed with their costs and charges in that behalf most wrongfully sustained.

W. A. HAWKINS,
S. B. NEWCOMB,
ALBERT B. FALL,
Counsel for Dfts.

Territory of New Mexico, }
County of Grant. } ss.

Wilfred T. Johns, being duly sworn on his oath says, that he is the secretary of The Rio Grande Dam & Irrigation Company and the resident secretary of the Rio Grande Irrigation and Land Company, Limited; that he has read the foregoing plea and that the same is true in every particular in point of fact and that the same is not interposed for delay.

W. T. JOHNS.

Subscribed and sworn to before me this twenty-sixth day of June, A. D., eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,
Notary Public.

We hereby certify that in our opinion the above plea is well founded in point of law.

A. B. FALL,
S. B. NEWCOMB,
W. A. HAWKINS,
Counsel for defendants.

United States of America, }
Territory of New Mexico, }

In the District Court of the Third Judicial District of the Territory of New Mexico, for the trial of causes arising under the laws of the United States.

The joint and separate answer of the Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, to the amended

bill of complaint of the United States of America, filed by the Attorney General of the United States and the United States Attorney for the Territory of New Mexico in the above styled court.

These defendants now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill contained for answer thereto or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering say:

1st. They admit that The Rio Grande Dam & Irrigation Company is a corporation duly organized under and in pursuance of the laws of the Territory of New Mexico, having its principal place of business in the town of Las Cruces, county of Doña Ana in said Territory, and has for its purposes and objects the construction and maintenance of dams, reservoirs, ditches, canals and pipe-lines as stated in said bill of complaint, and that in pursuance of its purposes of incorporation, it has given out that it is about to construct dams across the Rio Grande in the Territory of New Mexico, such as may be necessary to carry out the objects and purposes of its incorporation, and that it proposes to accumulate and impound water in such reservoirs, and distribute the same through said canals, ditches and pipe-lines, and that the Rio Grande Irrigation and Land Company, Limited, is a corporation organized under and by virtue of the laws of Great Britain, and having its principal office in the City of London, England.

2nd. These defendants admit, that the original defendant, The Rio Grande Dam & Irrigation Company,

has entered into a contract and agreement, for a conveyance to its co-defendant, of some of its rights, in and to its said dams, reservoirs, canals, ditches and pipelines, to be constructed as charged in the bill of complaint herein, and that said defendant, the Rio Grande Irrigation and Land Company, Limited, has claimed and is claiming the right to exercise all of the privileges and rights by it secured, by virtue of said contract, as aforesaid, but in so far as that portion of said bill is concerned, which charges that the Rio Grande Irrigation and Land Company, Limited, is seeking to obtain control of the entire flow of said Rio Grande, and to divert and use the same, these defendants state, that the entire flow of the Rio Grande during the irrigation season at the point or points where these defendants are seeking to construct reservoirs upon the same, has long since been diverted and is now owned and beneficially used by parties other than these defendants, in which diversion and appropriation of said waters these defendants have no property rights and that neither one of the defendants are seeking or have ever sought to appropriate or divert by means of structures above referred to, or contemplated diversion by means thereof of any of the waters of said Rio Grande usually flowing in the bed thereof, during the time when the same are usually put to beneficial use by those who have heretofore diverted the same, but on the contrary these defendants state that it has been their intention and their sole intention by means of the structures which they contemplate and which are complained of in said bill, to store, control, divert and use only such of the waters of said stream as are not legally diverted, appropriated, used and owned by others

and that these defendants have contemplated and now contemplate that any beneficial rights by them acquired in such stream by virtue of such structures will be very largely only so acquired to the excess, storm and flood waters thereof now unappropriated, useless, and which go to waste.

3rd. These defendants deny the statement that the Rio Grande receives no addition to its volume of water between Elephant Butte, at which place defendants admit they propose to erect a dam, and the mouth of the Conchos river as alleged in said bill of complaint, and deny that the character of the soil and the quality of the atmosphere is such in the section of country through which said river flows, that the impounding of such waters, either by means of evaporation or other causes or its distribution over the surface of the earth would prevent any material part of such water from returning to said river bed.

4th. These defendants deny that the said Rio Grande is navigable or has been navigated by steamboats up to the town of Roma in the state of Texas as is alleged in complainant's bill or that the same is susceptible of navigation or has been navigated above said town of Roma or any point whatever, and deny that said river is susceptible of navigation from the point of rapids mentioned in said complainant's bill above said town of Roma to La Jolla in the Territory of New Mexico, and deny that said river has at any times in the past been used beneficially for the purpose of floating or transporting rafts, logs or poles or that any portion of said stream in said Territory of New Mexico is susceptible of being used and navigated for commercial purposes, and deny that the said river is navigable or susceptible of being navigated for the pur-

pose of carrying on commerce between the Territory of New Mexico and the state of Texas and the Republic of Mexico.

5th. These defendants deny that the impounding of the water of said river by the construction of its said dam and reservoir at Elephant Butte or by any contemplated diversion by it of said waters for the uses above indicated will so deplete and prevent the flow of the water through the channel of said river below said dam as to seriously obstruct the navigability of said river at any point below said dam.

Defendants deny that they are proposing to construct said dam without the authorization of law, but on the other hand state and assert that they have full, complete and lawful authority to construct the same as it so proposes.

6th. These defendants deny that the navigability of said Rio Grande at the city of El Paso and state of Texas has been recognized and acknowledged by the Congress of the United States and the Secretary of War of the United States.

7. And these defendants further answering, deny that by treaty or treaty stipulations between the Government of the United States and the Government of Mexico, it has ever been agreed and declared that neither country shall, without the consent of the other construct any work that may or might impede or interrupt in whole or in part the exercise of said right of free navigation, above the southern boundary line of New Mexico, that is to say, above the parallel of 31 degrees 47 minutes 30 seconds north latitude; and defendants aver that by the treaty stipulations between the said governments it was agreed distinctly that each

government should have absolute sovereignty over the said Rio Grande within its boundaries;

And the defendants further deny that neither of the governments have consented to or authorized the construction of its dam at Elephant Butte, but allege on the contrary that the Government of the United States has consented to and authorized such construction as it has a right to do within its territorial limits.

And now having fully answered each and every allegation in said bill contained, which the defendant is advised it is necessary and material that it should make answer to, the defendants pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

W. A. HAWKINS,

S. B. NEWCOMB,

ALBERT B. FALL,

Counsel for defendants.

Territory of New Mexico, }
County of Grant. } ss.

Wilfred T. Johns being duly sworn, upon his oath, says: That he is the secretary of The Rio Grande Dam & Irrigation Company, and the resident secretary of the Rio Grande Irrigation and Land Company, Limited, defendants in the foregoing answer; that he has heard read the said answer, and knows the contents thereof; that the same and each, and every allegation therein contained are true, of his own knowledge, except that he has no personally knowledge of the navigability of the Rio Grande below the town of Roma, in the State of Texas, but that through official data, public maps and statements of witnesses, some of which were sworn to, by said parties, he is informed, and believes that the Rio Grande below the said town of Roma, out to the Gulf,

is not capable of any beneficial use for the purposes of navigation.

W. T. JOHNS.

Subscribed and sworn to, before me this twenty-fifth day of June, A. D., Eighteen Hundred and Ninety-Seven.

J. F. POSEY,

[SEAL]

Notary Public.

In the District Court of the Third Judicial District for the trial of causes arising under the laws of the United States, in the Territory of New Mexico, June 25th, 1897.

The United States,

No. 140. vs.

The Rio Grande Dam Co. et al.

} Vacation.

Come now the defendants in above entitled cause, by W. A. Hawkins, S. B. Newcomb and Albert B. Fall, their solicitors, and in answer to the rule to show cause heretofore issued, herein file their joint and several plea and answer to the original and amended bill of complaint, and upon the coming in and consideration of the same and the several affidavits filed together with the correspondence and volumes of the 10th, 11th, 12th and 14th annual reports of the Secretary of Interior, part irrigation, and Vol. 3 and 4, report of the Senate committee on arid lands, and report on irrigation, 1893, Secretary of Agriculture, and report of Secretary of War to 51st Congress, with the maps of arid lands, etc. Move this Honorable court here to discharge said rule and to dissolve the injunction heretofore granted herein, and to dismiss the original and amended bills of complaint.

W. A. HAWKINS,

S. B. NEWCOMB,

ALBERT B. FALL,

Counsel for Defts.

In the United States District Court of the Third Judicial District of the Territory of New Mexico.

United States of America,	}
No. 140. vs.	
The Rio Grande Dam & Irrigation Company, et al.	

Replication of the United States of America, complainant, to the joint and several answer of defendants in the above entitled cause.

This repliant, saying and reserving to himself all, and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith, that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendant is uncertain, untrue and insufficient to be replied unto by this repliant; without this, that, any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, confessed, and avoided, traversed or denied, is true; all which matters and things this repliant is, and will be, ready to aver and prove as this Honorable court shall direct; and humbly prays, as in and by their said bill they have already prayed.

W. B. CHILDERS,
United States attorney for
New Mexico.

In the United States District Court of the Third Judicial District of the Territory of New Mexico.

The United States of America,	}
No. 140. vs.	
The Rio Grande Dam & Irrigation Co., et al.	

Comes now plaintiff in the above entitled cause and moves the court to set down the joint and several pleas as filed in said cause by the defendants therein, for

argument as to their sufficiency as a defense to said suit, as a matter of law.

• W. B. CHILDERS,

U. S. Attorney for New Mexico.

In the District Court of the Third Judicial District of
the Territory of New Mexico.

United States of America,
Complainant.

No. — vs.

The Rio Grande Dam & Irrigation Company, et al.

Defendants.

Affidavit of Anson Mills, Brigadier General, United States Army, Boundary Commissioner.

State of Texas, }
County of El Paso. } ss.

Anson Mills, of lawful age, being duly sworn, upon oath deposes and says: That he is a Brigadier General in the United States Army, and has been for the past four years on special duty, as Mexican Boundary Commissioner, having in addition to that duty, in charge, together with the Mexican Commissioner, the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on its banks or tributaries, having equitable interests therein. That for several years in the past—nearly forty years ago—he resided in El Paso, Texas, and was engaged as an engineer and surveyor in this vicinity, surveying lands in Texas abutting on the Rio Grande. That eight years ago he was for twelve months engaged in the preliminary investigation, by order of the Department of the Interior, for an international dam, projected near this city. That for these reasons, and a general study of the regimen of the Rio Grande, he states with greater confidence than he

otherwise would, his knowledge of the questions submitted to the United States District Court in the Third Judicial District of the Territory of New Mexico, in an amended bill, prepared by United States Attorney Childers, which he has read and is familiar with.

Affiant states that from his own personal knowledge the Rio Grande is now navigated by steam from Brownsville, Texas, to Camargo, Tamaulipas, opposite Rio Grande City, Texas, a distance of about two hundred and fifty miles by the river's course, and from information and belief he states it to have been in former years navigated by steam as far as Roma, a distance of about three hundred miles by the river's course from Brownsville, Texas. The latter information was obtained from Maj. W. H. Emory's (United States Boundary Commissioner) official report of his survey of the boundary line in 1852 to 1855, and from the verbal statements of Captain Kelly, of Brownsville, Texas, who has been in the steamboat business for over thirty years, and who stated to affiant that at the time of the Maximilian war he had thirty steamboats in his service, operating between Brownsville, Texas, and Camargo, Tamaulipas, and that at the same period, the United States government had many additional vessels engaged in the same business, as well as several gunboats plying on the river, but at this date, his fleet has been reduced to one small vessel, the "Steamer Bessie," and that said Captain Kelly informed him by reason of the depletion of the depth of the channel of the Rio Grande, that it was now very difficult for him to navigate this one small vessel with very light draft.

And affiant further states that from information and belief, that the river has been navigated by sail boats,

flat boats and small boats above Roma, Texas, to a point about one hundred and fifty miles below Presidio del Norte, Texas. That he obtained this information from the aforesaid Major Emory's report, wherein it is stated that he procured a number of small boats built in San Antonio, Texas, and carried them to a point about one hundred miles above the mouth of Devil's river, and that his engineers used them for taking the topography of the country and surveying the boundary line; and from a report of Captain Love, in the employ of the quartermaster's department of the United States army, who claims to have carried a small boat up the river to within one hundred and fifty miles below El Paso, Texas, but affiant believes that he was mistaken in the point described, as in those days El Paso was known as El Paso del Norte, and Presidio, as Presidio del Norte, and affiant is of the opinion that he had Presidio del Norte in view in his report instead of El Paso del Norte, as written. Affiant further states that in 1858 he, with a party constructed and floated a raft of logs from a point known as El Canutillo, above El Paso, Texas, down to El Paso, for building purposes, and that he is informed and believes that the same has been done by many other parties about that time, the names of whom he is now unable to remember; and that recently a party constructing the Postal Telegraph Company's line, used the river's current for floating their telegraph poles down the river at a point near La Joya, New Mexico.

Affiant further states that in past years, namely forty years ago, there was comparatively an abundance of water in the river, and that it seldom went dry (about only once in seven years) and then for a very short period, generally about the month of August or Sep-

tember. That in later years the waters have been much depleted during the summer and fall, but the flood waters of the spring are still great and last from one to two months, during which period they are susceptible of carrying small boats, flat boats, rafts and logs. At times, periodically each year, the volume of water is so great that steamboats could navigate it for hundreds of miles both above and below El Paso, Texas.

Affiant further states that he has been engaged under the Geological Survey, in taking the flow of the river for a full year at El Paso, Texas, and has had access to the gaugings of the flow of the Rio Grande for many years both there, and at Embudo and Rio Grande, in the Territory of New Mexico.

Affiant further states, that there are no tributaries of the river of any importance below Embudo to El Paso, or for two hundred miles below El Paso to the mouth of the Conchos river. That while engaged in gauging the flow of the river, he was also engaged in observing the evaporation and discovered that the evaporation was over six feet from the surface per annum at El Paso, Texas, and as the region is arid for two hundred miles above and below El Paso, it is presumed that the evaporation would be about the same for that distance, and that the impounding of a large quantity of the flow of the river in a lake as proposed would, in his opinion, largely increase the ordinary evaporation of the waters, as would also the distribution of the waters through numerous canals and ditches, as proposed, through the arid soil, and in addition thereto, there would be still a great loss by seepage into the dry and porous earth, a very small portion of which seepage would, in all probability, return to the river, and this opinion is based upon his actual observation and knowledge of the irrigating systems of this country, soil and climate.

Affiant further states, that the Rio Grande receives the greater portion of its waters from its tributaries in Colorado and New Mexico, above Elephant Butte; that its next important tributary is the Conchos river, which empties into the Rio Grande about two hundred miles below El Paso, Texas. That in the past ten years, the numerous ditches and canals taken out of the head waters of the river in Colorado and Northern New Mexico, have impaired the navigable capacity of the river continuously below to the Gulf during the summer months, but have not entirely destroyed it. What is stated just above generally, will be shown specifically in detail by an official report of Assistant Engineer W. W. Follett, on his investigations of the upper waters of the Rio Grande in Colorado and New Mexico, dated November 17th, 1896.

Affiant further states, that in an official investigation, superintended by him, of a proposed lake similar to the one proposed with a dam sixty feet high, it was discovered that the cubic contents of the entire reservoir would be 537,340 acre feet and that if full of water, the evaporation from the surface for one year, would be six and one-half feet off the surface o. 130,000 acre feet of the total cubic contents of 537,340 acre feet, just about one-fourth the cubic contents of the lake. The evaporation was measured by actual tests in the most skilled methods now known.

ANSON MILLS.

Subscribed and sworn to before me this, the 23rd day of June, A. D. 1897.

D. H. HART,
Clerk of U. S. District Court,
W. D. T.

[SEAL]

By J. P. HODGSON,
Deputy.

+

This indenture made the thirtieth day of May, in the year one thousand eight hundred and ninety-six, between The Rio Grande Dam & Irrigation Company, a corporation organized under and by virtue of the laws of the Territory of New Mexico and the provisions of an Act of the Legislative Assembly of the said Territory, approved February twenty-fourth, one thousand eight hundred and eighty-seven, and to all laws amendatory thereof, party of the first part, and the Rio Grande Irrigation and Land Company, Limited, a corporation organized under Companies Acts, of the United Kingdom of Great Britain, and Ireland, 1862 to 1890, party of the second part:

Whereas, the Government of the United States of America, did on the first day of February, one thousand eight hundred and ninety-five, grant unto the party hereto of the first part, certain exclusive rights, privileges, franchises and concessions to be exercised and enjoyed in the manner and within the area hereinafter set forth, to appropriate the waters of the Rio Grande river, to erect dams, weirs, ditch-heads, canals, reservoirs and all other works in connection with irrigation, for public and private purposes, and in connection with the said purposes, to locate, establish and maintain rights of way, for the conveyance of water over certain public and private lands mentioned hereinafter, together with the right and privilege to occupy all lands subject to overflow, by reason of the erection of the aforesaid dams and reservoirs, canals and other irrigation works, and fifty (50) feet on both sides of the said water-ways and canals, and the right of taking and using from such lands, such timber, earth and stone as may be needed in constructing any of the aforesaid works, and any works and buildings in connection therewith, and:

Whereas, the party of the first part, has in consideration of divers valuable considerations, agreed to enter into these presents, now, therefore:

This Indenture Witnesseth, that the said party of the first part, for, and in consideration of the rents, covenants and agreements hereinafter mentioned, reserved and contained, on the part and behalf of the said party of the second part, its successors and assigns, to be paid, kept and performed, has leased, demised and to farm, let and full liberty given to enjoy and exercise, and by these presents, does lease, demise and to farm, let and full liberty give to enjoy and exercise, unto the said party of the second part, its successors and assigns, all and singular the property of whatsoever nature, and wheresoever situated, of and belonging to the said party of the first part, and all appurtenances thereunto belonging or in anywise appertaining, including all the rights, privileges, franchises and concessions granted to the said party of the first part, by any and all acts of the Government of the United States of America, or by any and all orders, rules, certificates, patents, decrees or charters of any and all departments of the said Government of the United States as hereinbefore referred to, and by any and all laws, acts, charters and authorities of the said Territory of New Mexico, authorizing and empowering the said party of the first part, to locate, establish and maintain rights of way for the conveyance of water over public and private lands in the said Territory of New Mexico and elsewhere and to construct and maintain dams, reservoirs, canals, ditches and pipe-lines for the purpose of impounding and supplying water for irrigation, min-

ing, manufacturing, domestic and other uses to private and public consumers and to towns and cities for municipal and commercial and all other purposes and to acquire and dispose of lands and other property in connection therewith, and to colonize and improve the said lands.

All of which rights, privileges, franchises and concessions are to be enjoyed in the manner, and the lands are situate in the area, more particularly described as follows:

That is to say, the beginning point and terminus of the main line of such canals, ditches and pipe-lines shall be deemed to begin at the dam or dams to be built across the Rio Grande at any point or place or various places within townships thirteen (13) and fourteen (14) and ranges three (3) and four (4) west in Sierra county, New Mexico, and to terminate at any point or place and various and several places in the Territory of New Mexico, State of Texas and Republic of Mexico, to which it may be practical to carry the waters so accumulated, and the general courses and directions of such new canals, pipe-lines and ditches shall be southerly and southeasterly along the Rio Grande and through the Mesilla Valley and the El Paso Valley and into the Republic of Mexico and southwesterly and easterly to such places as may be practical to extend the said canals, pipe-lines and ditches and convey the water so accumulated, and the lengths thereof shall be from fifty miles to five thousand miles, it being impossible to state the point of beginning, terminus, course and length of the said canals, ditches and pipe-lines more definitely.

To have and hold the said above mentioned and described premises, with the appurtenances and

grants and franchises, unto the said party of the second part, its successors and assigns, from the first day of June, one thousand, eight hundred and ninety-six, for and during and until the full end and term of forty-seven years, thence next ensuing and fully to be completed and ended. Yielding and paying therefore unto the said party of the first part, its successors or assigns, yearly and every year during the said term hereby granted, the yearly rent and sum of one dollar, lawful money of the United States of America, when demanded. Provided, always, nevertheless, that if the yearly rent above reserved, when demanded, or any part thereof, shall be behind or unpaid on any day of payment, whereon the same ought to be paid as aforesaid, or if default shall be made in any of the covenants herein contained on the part and behalf of the said party of the second part, its successors and assigns, to be paid, kept and performed, then and from thenceforth it shall and may be lawful for the said party of the first part, its successors and assigns, into and upon the said demised premises and every part thereof, wholly to re-enter and the same to have again, re-possess and enjoy as in its first and former estate, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

And the said party of the second part for itself and its successors and assigns, doth covenant and agree to and with the said party of the first part, its successors and assigns, that it shall and will yearly and every year during the term hereby granted, well and truly pay or cause to be paid unto the said party of the first part, its successors and assigns, the said yearly rent above reserved, when demanded on the days and in the

manner limited and prescribed as aforesaid, for the payment thereof without any deduction or delay according to the true intent and meaning of these presents. And the said party of the second part, for itself and its successors and assigns, doth covenant and agree that it shall and will at its own cost and charge bear, pay and discharge all such present and future taxes, whether special or general and all duties and assessments whatsoever as shall or may during the said term hereby granted be levied, charged or assessed or imposed upon the said described premises or any part thereof, by virtue of any present or future law of the United States of America, or of the Territory of New Mexico.

And the said party of the second part, its successors and assigns, doth covenant and agree that it shall and will at its own costs as often as occasion shall require, of which the said party of the second part, its successors and assigns, shall be the sole judge, well and sufficiently repair, support and maintain and keep in good and substantial repair and condition the property and premises subject to such repair hereby demised, or expressed so to be, and also all other, the erections, works and buildings which shall at any time during the said term be erected and set up, in or upon the said demised premises and the same in such good and substantial repair and condition, shall and will at the expiration or sooner determination of the said term of forty years, peaceably and quietly surrender and give up unto the said party of the first part, its successors and assigns, the reasonable use and wear thereof in the meantime only excepted.

And the said party of the first part, for itself and its successors and assigns, doth covenant and agree by these presents, that the

said party of the second part, its successors and assigns, paying the said yearly rent above reserved and performing the covenants and agreements aforesaid on his or their part shall, and may at all times during the said term hereby granted, peaceably and quietly, have, hold and enjoy the said demised premises without any let, suit, trouble or hinderance of or from the said party of the first part, its successors or assigns, or any other person or persons whatsoever.

And the said party of the first part for itself and its successors and assigns, doth covenant and agree by these presents, that in the event that the said party of the first part shall be granted or may acquire or obtain a renewal or extension of the rights, privileges, charters and franchises, which it now holds and possesses by virtue of certain orders and grants by and from the government of the United States of America and by virtue of the acts and laws of the Legislative of the Territory of New Mexico, then and in that event the said party of the first part will renew and extend to the party of the second part, the term of these presents to the full extent and term of such renewal and extension so granted to the party of the first part, less the period of one day, at the same rent and subject to the same covenants and conditions as are herein reserved and contained, and the said party of the first part, for itself and its successors and assigns, doth further covenant and agree with the party of the second part, that it will upon request of the party of the second part and at its expense, convey and assign to the party of the second part absolutely the premises hereby demised.

In witness, whereof the parties hereto have caused

their respective corporate seals to be hereunto affixed the day and year first above written.

[SEAL.]

The corporate seal of the Rio Grande Dam & Irrigation Company was hereunto affixed in the presence of Nathan E. Boyd, as attorney for the Rio Grande Dam & Irrigation Company in fact.

The common seal of the Rio Grande Irrigation and Land Company, Limited, was by the order of the board of directors affixed in the presence of

W. J. ENGLEDDUE,

WINCHILSEA & N.

Directors.

[SEAL.]

N. P. ALLISON,

Secretary.

Kingdom of Great Britain and
Ireland, City of London, } ss.
England.

On the thirtieth day of May, A. D., 1896, before me appeared Nathan E. Boyd, to me personally known, who being by me duly sworn, did say that he is attorney in fact of the Rio Grande Dam & Irrigation Company, and that the seal affixed to the within instrument is the corporate seal of the said corporation, and that the said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said Nathan E. Boyd acknowledged said instrument to be the free act and deed of said corporation.

Also on the same day before me appeared William John Engledue, Colonel retired in her Majesty's Royal Engineers and The Right Honorable Murray Edward Gordon, Earl of Winchilsea and Nottingham and Nathaniel Paul Allison, to me personally known, who being by me duly sworn, did say that they are respec-

tively, two of the directors and the secretary of the Rio Grande Irrigation and Land Company, Limited, and that the seal affixed to the said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors, and the said William John Engledue, The Right Honorable Murray Edward Gordon, Earl of Winchilsea and Nottingham, and Nathaniel Paul Allison acknowledged said instrument to be the free act and deed of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[SEAL]

PATRICK A. COLLINS,
Consul General of the United States of
America, at London, England.

Filed for record in my office this twentieth day of June, A. D. 1896, at 1 o'clock p. m., and duly recorded in Book of Deeds No. 18, pages 120, 121, 122, 123 and 124, records of Doña Ana County, N. M.

[SEAL]

H. F. STEPHENSON,
Recorder.

Territory of New Mexico, }
Sierra County, } ss.

This instrument was filed for record on the 26th day of June, A. D. 1896, at 8 o'clock, a. m., and duly recorded in Book B, on pages 490 to 494 inclusive. Miscellaneous Records.

[SEAL]

THOS. C. HALL,
Recorder.

Territory of New Mexico, }
Sierra County. } ss.

I, Thos. C. Hall, Probate Clerk and ex-Officio Re-

corder in and for said county, in the Territory aforesaid, do hereby certify that the foregoing is a true and correct copy of an instrument as the same appears of record in my office.

[SEAL] In testimony I have hereunto set
my hand and official seal at my
office in Hillsboro, New Mexico,
this 1st day of July, A. D. 1897.

THOS. C. HALL,
Probate Clerk and ex-Officio Recorder.

Territory of New Mexico, {
County of Dona Ana. } ss.

We, the undersigned, desiring to form a company pursuant to the laws of the Territory of New Mexico and to the provisions of an act of the Legislative Assembly of said Territory, approved February 24th, 1887, and to all laws amendatory thereof:

Do hereby make, sign and acknowledge these articles of incorporation and do hereby set forth and certify as follows:

First. The full name of the incorporators are Edwin C. Roberts, Edward V. Berrien, John L. Campbell, Peter E. Kern, Phoebus Freudenthal, John H. Riley, Solomon Schulz, Albert M. Loomis, and L. Bradford Prince; and the corporate name of such company is The Rio Grande Dam & Irrigation Company.

Second. The purposes for which said company is formed are, for the purpose of constructing and maintaining dams, reservoirs and canals, and ditches and pipe-lines for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including supply of water for cities and towns, for municipal and commercial uses, and for power and all other useful purposes to which

water can be supplied, and for the purpose of colonization and the improvement of lands in connection therewith; and for such other purposes, and with such other objects, powers and privileges as may be permitted or conferred by general or special acts of this Territory, or by the act of Congress of the United States or the Government of Mexico. And it is the purpose of this company to carry on and transact any and all operations pursuant to the purpose and within the powers herein set forth as well in the Territory of New Mexico, and the state of Texas and the Republic of Mexico; and to acquire, mortgage and dispose of property, and transact business in any place or jurisdiction within or without the United States of America. And the beginning point and terminus of the main line of said canals, ditches and pipe-lines shall be to begin at the dam or dams to be built across the Rio Grande, at any point or place or various and several places within township thirteen (13) and fourteen (14) and ranges three (3) and four (4) west, in Sierra county, New Mexico, and to terminate at any point or place and various and several places, in the Territory of New Mexico, state of Texas, and Republic of Mexico, to which it may be practicable to carry the waters so accumulated; and the general courses and directions of such canals, pipe-lines and ditches, shall be southerly and southeasterly along the Rio Grande, and through the Mesilla valley and the El Paso valley, and into the Republic of Mexico, and southwesterly and easterly to such places as may be practical to extend said canals, pipe-lines and ditches and convey the waters so accumulated, and the length thereof shall be from fifty miles to five thousand miles, it being impossible to state the point of beginning, terminus, course and length of said canals, ditches and pipe-lines more definitely at this time.

Third: The amount of capital stock shall be five million dollars, to consist of fifty thousand shares of one hundred dollars each.

Fourth: The term of existence of said company shall be fifty years.

Fifth: The number of directors shall be nine, and the names of those who shall manage the business of the company for the first year are: Edwin C. Roberts, Edward V. Berrien, John L. Campbell, Peter E. Kern, Phoebus Freudenthal, John H. Riley, Solomon Schulz, Albert M. Loomis, and L. Bradford Prince, stock holders of said company, and the majority of whom are residents of the United States, and at least one-third of whom are residents of this Territory.

Sixth: The name of the city and county in which the principal place of business of the company is to be located are city of Las Cruces, county of Doña Ana, within the Territory of New Mexico, with offices also in El Paso, Texas, the city of Juarez, Mexico.

In witness whereof, we have hereunto set our hands and seals this twelfth day of January in the year eighteen hundred and ninety-three.

E. V. BERRIEN,	[SEAL]
EDWIN C. ROBERTS,	[SEAL]
PHOEBUS FREUDANTHAL.	[SEAL]
JNO. H. RILEY,	[SEAL]
J. L. CAMPBELL,	[SEAL]
A. M. LOOMIS,	[SEAL]

Territory of New Mexico, }
 County of Doña Ana. } ss.

On this sixth day of September, eighteen hundred and ninety-three, before me personally appeared Edwin C. Roberts, Edward V. Berrien, John L. Campbell, Phoebus Freudenthal, John H. Riley, Albert M. Loomis,

to me known to be the persons described in, and who executed the foregoing articles of incorporation, and severally acknowledged that they made, signed and executed the same as their free acts and deeds.

In witness whereof, I have hereunto set my hand and notorial seal, at my office in Las Cruces, the day and year last above written.

MORRIS FREUDENTHAL,

[SEAL]

Notary Public,

Doña Ana County, Nuevo Mexico.

Territory of New Mexico, {
Office of Secretary. } ss.

I have compared the preceding copy of "The Rio Grande Dam & Irrigation Company," with the original thereof on file in this office, and I hereby certify the same to be a correct transcript therefrom and of the whole thereof.

Witness my hand and the seal of the Secretary of the Territory, at Santa Fe, the twenty-fifth day of January, one thousand eight hundred and ninety-six.

LORION MILLER,

[SEAL]

Secretary of New Mexico.

[PUBLIC—No. 280.]

An act to authorize the construction and operation of a street-railway and wagon bridge across the Rio Grande, between the city of El Paso, Texas, and Paso del Norte, Mexico.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of Congress is hereby given to the Santa Fe Street Railway Company, a corporation organized and created under and by virtue of the laws of the State of Texas, to construct, own, maintain and operate a street railway and wagon bridge

across the Rio Grande, between the city of El Paso, in the State of Texas, and Paso del Norte, State of Chihuahua, Mexico, at such point as may be most convenient to said corporation to unite and connect a street railway to be constructed by it in the said city of El Paso with any street railway that may be constructed by any person, persons or company in said Paso del Norte; and to build and lay on and across said bridge ways for the passage of animals, foot-passengers, and vehicles of all kinds, and for the transit of freight, goods, wares and merchandise, for which said corporation may charge a reasonable toll, which charge shall be subject to revision and regulation from time to time by the Secretary of War.

Sec. 2. That said bridge shall be built of good, substantial material, and of such strength and dimensions as may be sufficient to render the passage of all such vehicles, animals and persons as are herein mentioned perfectly safe at any and all times.

Sec. 3. That said bridge shall not interfere with the free navigation of said river, and in case of any litigation arising from an obstruction or an alleged obstruction to the free navigation thereof, caused or alleged to be caused by said bridge, the case may be tried before the Circuit or District Court of the United States for the State in which any portion of said bridge may be situated.

Sec. 4. That equal privileges in the use of said bridge shall be granted to all telegraph companies, and the United States reserves the right for the the establishment of a postal telegraph across said bridge.

Sec. 5. That the consent of the State of Chihuahua, United States of Mexico, and of the proper authorities of the Republic of Mexico shall have been obtained before said bridge shall be built or commenced.

Sec. 6. That unless the construction of said bridge be commenced within one year and finished within three years from the date of the passage of this act, the provisions of this act shall be null and void.

Sec. 7. That Congress reserves the right to withdraw the authority and power conferred by this act, in case the free navigation of said river shall at any time be substantially or materially obstructed by said bridge, or for any other reason, and to direct the removal or necessary modifications thereof at the cost and expense of the owners of said bridge; and Congress may at any time alter, repeal, or amend this act.

Approved, September 6, 1888.

[PUBLIC—No. 183.]

An Act to authorize the construction of a street-railway and wagon-road bridge over the Rio Grande River between the city of El Paso, Texas, and Paso del Norte, Mexico.

Be it Enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the El Paso Street Railway Company, a corporation organized and created under and by virtue of the laws of the State of Texas, be, and is hereby, authorized and empowered to construct, own, maintain, and operate a street railway bridge over the Rio Grande river between the city of El Paso, in the State of Texas, and the city of Paso del Norte, in the State of Chihuahua, Mexico, at such point as may be most convenient to said corporation to unite and connect the street-railroad to be constructed by them in the said city of El Paso with any street-railroad that may be constructed by any person or company in the said city of Paso del Norte, and to build and lay on and across said bridge, ways for the passage of animals,

foot-passengers, and vehicles of all kinds, for the transit of which said corporation may charge a reasonable toll, which charge shall be subject to revision and regulation by the Secretary of War from time to time.

Sec. 2. That said bridge may be built with unbroken and continuous spans, of the following dimensions, to-wit: Six hundred feet in length, twenty feet in width, ten feet in height above high water level, and with twenty-eight spans, twelve of which to be thirty feet in length and sixteen of which to be fifteen feet in length; that said bridge when completed in the manner herein specified shall be deemed and taken to be a legal structure: *Provided*, That said bridge shall not interfere with the free navigation of said river; and in case of any litigation arising from an obstruction or alleged obstruction to the free navigation thereof caused or alleged to be caused by said bridge, the case may be tried before the District Court of the United States of the State in which any portion of said bridge may be situated: *And provided also*, That Congress reserves the right to withdraw the authority and power conferred by this Act, in case the free navigation of said river shall at any time be substantially or materially obstructed by said bridge, or for any other reason, and to direct the removal or necessary modifications thereof at the cost and expense of the owners of said bridge; and Congress may at any time alter, repeal, or amend this Act. *And provided further*, That the consent of the Mexican State of Chihuahua, and of the proper authorities of the Republic of Mexico shall have been obtained before said bridge shall be built or commenced.

Approved July 28, 1882.

Territory of New Mexico, }
 County of Grant. } ss.

Wilfred T. Johns, being duly sworn on his oath, says, that he is the secretary of the Rio Grande Dam & Irrigation Company and the resident secretary of the Rio Grande Irrigation and Land Company, Limited, the defendants in the injunction suit now pending against them in the District Court of the Third Judicial District of the Territory of New Mexico, at the instance of the United States.

That previous to last January they had expended a large amount of money in the completion of its surveys and the gathering of the data for the construction of its physical works in the Territory of New Mexico, and that previous to last January it had let its contracts for the construction of a large portion of the same, including a portion of its irrigation canals in Dona Ana county and also some of its smaller dams and pipe-lines to be used in conjunction with its main Elephant Butte dam and reservoir, and that the work of such construction had progressed so far in the county of Dona Ana aforesaid, that said New Mexico company had laid out and expended in such construction work alone, exclusive of such surveys, the sum of about ninety thousand dollars (\$90,000.00), and all told including surveys up to that time and the salaries of its officials, it had paid out and expended about one hundred and fifty thousand dollars (\$150,000.00).

That such physical work so constructed by it to the value of ninety thousand dollars was so constructed in the bed and along the shores of the Rio Grande; that at the the time of the service of the injunction in this case upon said company it had let the contract and was responsible thereunder in addition to the amount so ex-

pended by it as aforesaid, for a largely increased amount beyond the same; that its contractor was then engaged in the preparation for such works, and said company had also procured the services of, retained and then had in their employ and under contract, a large number of skilled and other employees.

That the granting and service of said injunction upon this defendant necessitated the abandonment of a force which had been gathered for the prosecution of such work by the said contractor, and greatly to the damage and injury of said defendants in the delay in the prosecution of its said work and created wide-spread fear and distrust and dissatisfaction on the part of said company's stockholders, as greatly to injure its financial credit and standing, and threaten its existence as such an enterprise.

Affiant further says that to any longer continue the injunction in this cause would force the said defendants to a loss of those works heretofore constructed by them in the way of ditches, canals and pipe-lines, because it would be impossible to preserve those portions already constructed, except by using the same in connection with the perfected system of which they will form a part when the same is completed,

Affiant further says that according to the history of the Rio Grande river said defendants have a right to expect that the waters therein will be dry or practically so within a short period, and that then if unrestrained by injunction, said companies may prosecute said work and complete the same in and along the bed and banks of said river at a great deal less expense than if they are compelled to carry on and effect such works during a season when the river is flushed with water.

W. T. JOHNS.

Subscribed and sworn to before me this twenty-sixth day of June, A. D. eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,

Notary Public.

Territory of New Mexico, }
County of Grant. } ss.

Henry S. Gillett, being duly sworn, on his oath says: That he is a resident of the County of Grant, and Territory of New Mexico; that in 1849, and from that time until sometime in 1860, some odd, he lived in El Paso, Texas; that he has been intimately acquainted with the Rio Grande river at El Paso, Texas, and at points above there, in New Mexico ever since 1849; that from said date and up to 1862 or '63, when affiant left El Paso, the Rio Grande was practically in all essential features the same character of stream that it is to-day; the same sand banks, and sand bars, the same scarcity of water, the same immense floods coming up and going down with great rapidity; that practically during every year, while affiant lived at El Paso, the said river at said place was dry, and during such seasons, affiant frequently and almost every year, crossed the dry bed thereof at that place; that during the season when the same was not dry, there would be a small volume of water only passing there, possible only two feet deep and from thirty to fifty yards wide; that when affiant first became acquainted with the river, its waters were diverted at and near El Paso by an old Mexican, who was farming with the same, and during all the time that affiant remained acquainted with the same there was an old Mexican dam in the same, just above the town of El Paso, which would have absolutely cut off all navigation, had it been possible to navigate said river with the amount of water there was in it on an average;

affiant says that said dam had been at such place in said river, so affiant was informed, from the time whereof the memory of man runneth not to the contrary, and affiant is informed that the same is still maintained at said place; affiant says that said river never was navigable at said town of El Paso or above or below, within the knowledge of affiant, that it was never used for any purpose by the people except for watering stock and for diverting for agriculture; that affiant has been informed that one Brigadier General Mills has made an affidavit in this case, that back in 1858, he, the said Mills, constructed a raft at Canutillo and floated the same down to El Paso; affiant says that it is possible that the said Mills did this during a high water period, but that if so, the logs referred to could have been nothing more than small cottonwood poles, because that was the only kind of timber that ever has been grown near said place of Canutillo; that said place was then and still is familiar to affiant.

Affiant further says that such a case must have been an isolated instance and affiant knows that such river was not beneficially used for such purposes as a usual thing.

Affiant further says that during the high floods of said river it is impossible to navigate the same with boats, both because of the shifting, changing bed and the fact that the water spreads out all over the valleys through which it flows and also because it flows with such terrific force.

Affiant further says that said Rio Grande has no navigable capacity and is not susceptible of navigation at any point where affiant knows the same.

HENRY S. GILLET, T.

Subscribed and sworn to before me this twenty-sixth

day of June, A. D., eighteen hundred and ninety-seven

[SEAL.]

J. F. POSEY,
Notary Public.

Territory of New Mexico, }
County of Grant. } ss.

A. K. Watts, being duly sworn, on his oath says: That he has known the Rio Grande River in New Mexico ever since 1864, when he was stationed along its course at different places, as United States soldier, and that since said time, business and pleasure have often taken him across and along its course; that the same has never been a navigable river, or had any navigable capacity since his acquaintance with it; that his knowledge is so close and thorough of it, that he is able to state to the court substantially from the same alone, that neither trees, nor rafts, nor boats have ever been floated by the people for pleasure or commerce in New Mexico upon its waters, except that some lone instance may have occurred where for a short distance the same could have been floated, or in some unusual flood some venturesome person may have undertaken to go down the same in a boat; that affiant has heard of such instances, but never heard of one except where the party thus attempting to navigate the stream came to grief; that it is practically now in the same condition that it was when he first became acquainted with it in 1864; has seen the stream go dry in dry seasons, swelling with floods which rapidly rise and fall quickly, changing its banks and course, always treacherous and of such a character that the community laughs when any one describes it as navigable.

Affiant further says that even at the highest floods in the stream, because of its treacherous character, of the

great fall which it has, that it is incapable of navigation; and further affiant sayeth not.

A. K. WATTS.

Subscribed and sworn to before me this twenty-sixth day of June, A. D., eighteen hundred and ninety-six.

J. F. POSEY,
Notary Public.

[SEAL]

Territory of New Mexico, } ss.
County of Grant.

Dr. Lewis Kennon, being duly sworn, on his oath says: That he resides in Silver City, New Mexico, but has known the Rio Grande intimately since 1853; that during considerable portions of such period, affiant has at various times lived along the course of the Rio Grande, in the Territory of New Mexico; that the general characteristics of said river at the present time are substantially the same as when affiant first knew it in 1853; that the same is not and never has been a navigable stream in New Mexico, or capable or susceptible of being navigated; that it has never been beneficially used by the people in New Mexico for commercial purposes and is incapable of such beneficial use by reason of its rapids, its quick sands, sand bars, shifting banks and lack of water; that during the period when affiant has known it he has never known of it being used for floatage of logs or rafts or boats; that even at its high flood season in New Mexico it is incapable of being navigated because of the reasons aforementioned.

LEWIS KENNON.

Subscribed and sworn to before me this twenty-sixth day of June, A. D., eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,
Notary Public.

Territory of New Mexico, }
 County of Grant. } ss.

James Brent, being duly sworn, on his oath says: That he has known the Rio Grande river for as many as seventeen years; that he has crossed it a great many times and camped along its shores; that it is not navigable anywheres in New Mexico; neither has it any navigable capacity, that it is full of rapids and sand bars and has never been used and is incapable of being used by the people for floating logs, except you would pursue each log and get it off the sand bars, and neither can they float rafts or boats thereon; affiant further says that even in its highest floods it would be impossible for a boat to navigate the same; that there is no timber along its banks which can be floated thereon.

And further affiant sayeth not.

JAS. R. BRENT.

Subscribed and sworn to before me this 26th day of June, A. D. eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,
 Notary Public.

Territory of New Mexico, }
 County of Grant. } ss.

Richard Hudson, being duly sworn, on his oath says: That he became familiar with the Rio Grande in New Mexico, in the spring of 1863 as a volunteer officer of the United States Army, stationed at El Paso, and that he remained at said place of El Paso and at points up and down the Rio Grande, from 1863 to 1866; that during such period affiant had every opportunity to observe and did observe the flow of the water and the general condition of the Rio Grande; that during such period, the exact date of which affiant does not remember, said Rio Grande was dry at El Paso and above El

Paso for considerable distance, and that this occurred for several periods during such time, a year or more apart; that affiant was then and ever since has remained familiar with the navigable capacity of said river in New Mexico; and that from his own knowledge states that the same at no point in New Mexico during such period has ever been navigable, in the sense that it was put to any beneficial use or could be put to any beneficial use by the people living in the section of the country through which it flows, except for watering stock and diverting its waters; which custom of diverting its waters was in vogue at the time affiant came to this country and affiant has reason to believe for a long time prior thereto; that during the time when affiant was stationed on said river as an officer and during the period since that time, affiant has never known any rafts, boats or crafts of any kind to have been used by the people upon such river, except to cross the same during flood times, and affiant unhesitatingly says that it has at all times remained incapable of any such use; that even during its high flood seasons it is incapable of any such use by either rafts or boats; it is incapable of being used for beneficially floating logs on account of the sand bars in its channel and the difficulty of keeping such logs in the water even if there was any timber along its banks, which affiant states there is not at any point within the Territory of New Mexico, and that if anybody ever floated rafts in the same, such rafts must have been comprised of small cottonwood trees or small underbrush and must have been inspired with the desire of achieving the impossible, than to accomplish any beneficial purpose.

RICHARD HUDSON.

Subscribed and sworn to before me this twenty-sixth

day of June, A. D. eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY.

Notary public.

Territory of New Mexico, { ss.
County of Grant.

John D. Bail, being duly sworn, on his oath says: That he resides in Silver City, New Mexico, at present, but that he has known the Rio Grande in the Territory of New Mexico from its Texas boundary north, for a period of thirty years, and during the time before railroads were known in New Mexico, he has staged along its course from point to point in said Territory a great deal; that he resided upon the same at Las Cruces and Mesilla for a period of ten years; that from his own knowledge of the uses which have been made of such river, and from its capacity, he states that the same is not navigable in the way he understands that term, that is, that it is not capable in its natural condition of being put to any beneficial uses as a highway for commerce or for pleasure; that even during its flood times he never has known it to be navigated or put to any useful purpose, and in his own opinion it is, even at such periods, incapable of being navigated.

Further affiant sayeth not.

JNO. D. BAIL.

Sworn and subscribed before me this _____ day of June, A. D., eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,

Notary Public.

Territory of New Mexico, { ss.
County of Grant.

James T. Reed, being duly sworn, on his oath says: That he is a surveyor and civil engineer by profession;

that he has been engaged ever since 1880 in New Mexico in making surveys both of a government and private character; that he is a United States mineral surveyor and that he is acquainted with the Rio Grande river from Fort Quitman in Texas, about seventy-five miles below El Paso, to the town of Albuquerque; that the same is unnavigable, incapable of being navigated and unsuceptible of being navigated and in fact has not since affiant become acquainted with the same ever been navigated from said place of Fort Quitman to said place of Albuquerque; that this lack of navigable capacity is caused by the river for its entire distance being a sand bank, shifting current, shallow stream and even in its highest floods it is impossible of navigation because of its shifting, cutting and filling up characteristics, and because of the force of its current; that it is now practically the same character of stream as when affiant first knew it in 1880; that since 1880 affiant has even known it to be dry in New Mexico, and that in the year 1880 affiant traveled along the course of the Rio Grande from Fort Quitman to El Paso and had to dig in the bed of the Rio Grande for sufficient water for himself and his animals, from said Fort Quitman up to Fort Rice, a distance of ————— miles.

Affiant says that it cannot be used even for floating timbers and that even if it could, there is no valuable timber capable of use along its banks or tributary thereto.

JAMES T. REED.

Subscribed and sworn to before me this twenty-sixth day of June, A. D., eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY.
Notary Public.

Territory of New Mexico, {
 County of Grant, { ss.

Ricard L. Powel, being duly sworn, on his oath, says: That since the year 1880 he has been engaged as a United States Government Surveyor and a United States Deputy Mineral Surveyor in prosecuting surveys in the Territory of New Mexico to such an extent that he has become largely familiar with the topographical features of nearly the whole Territory; that he is acquainted with nearly all of its streams, mountains and plains; that from such period and up to the present time he has made many surveys government and others along the Rio Grande river in the Territory of New Mexico from practically the northern boundary of the Territory to Las Cruces therein; that he has been in the valley of the Rio Grando making such surveys a great many different times and at all seasons of the year; that from the knowledge so obtained by him he is enabled to state definitely and with a full confidence in his own opinion that such river is not now and has never during such period of time been navigable in said Territory; that on many different occasions and different seasons he has crossed the same both in the northern part of the Territory and in the southern part when it was practically dry; that he has observed its flood seasons, the duration and magnitude thereof; that during such flood seasons it is also incapable of navigation, that it is incapable of being beneficially used in such flood seasons even for floating logs, because of the many sand-bars and other obstructions in its channel; that during such flood seasons it spreads out in the valleys through which it flows to considerable width, but that its depth is very shallow, and that sand-bars, continually even

during such floods and almost hourly change and throw its course from one direction to another, and that there is no well defined channel even during flood season that could be used for navigation; that such a thing as a steamboat or raft ascending or descending its channel in New Mexico during flood season is impossible and would be considered absurd by any of the people living along its course.

RICARD L. POWEL.

Subscribed and sworn to before me this twenty-fifth day of June, A. D. eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,
Notary Public.

Territory of New Mexico, }
County of Grant. } ss.

John M. Ginn, being first duly sworn: on his oath, says: That he has known the Rio Grande river in New Mexico ever since 1870; that during portions of such period that he has lived along its course, particularly at Fort Seldon, in New Mexico, and that he has been during such time familiar with its entire course through the Territory; that in its general character and condition it is the same today as when he first became acquainted with it, that it is a dangerous, treacherous, sand bar, quicksand stream, never has been navigated or capable of navigation during the period affiant has known it, and has, during such entire time, been incapable of navigation, that he has drank the waters of the river, has been swallowed up in its quicksands and has for years gazed at its ugly and tortuous current and been impressed with its ugliness and utter uselessness except for purposes of irrigation; affiant further says that even in its highest floods it is incapable of navigation and that if as stated in the affidavit of Brigadier

General Mills in this case steamboats could ascend for a hundred miles above El Paso that verily, in the opinion of this affiant, they could only do so by the aid of wings.

Further affiant sayeth not.

JOHN M. GINN.

Subscribed and sworn to before me this twenty-fifth day of June, A. D. eighteen hundred and ninety-seven.

[SEAL]

J. F. POSEY,

Notary public.

EXHIBIT "A"

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE,

WASHINGTON, D. C., Nov. 14th, 1891.

Register and Receiver, Las Cruces, New Mexico.

GENTLEMEN:—I enclose herewith copies of selections of lands in your district made the Director of the Geological Survey for permanent sites for irrigating reservoirs under Acts of Congress of October 2, 1888, August 30, 1890, and March 3, 1891. The question of permanently withdrawing these lands from entry or filing is now pending and in order that parties may not be injured by placing improvements upon land which they may be unable to secure title to, you will allow no entries or filings for any of said tracts until further advised.

Acknowledge receipt hereof.

Very respectfully,

[Signed] W. M. STONE,

Assistant Commissioner.

New Mexico.

Reservoir Site No. 38, (Plat No. 38, T. 9, 10 and 11 S. R. 3 W. New Mexico Principal Meridian)

(Recommended to the Secretary of the Interior in letter dated February 27, 1891.)

DESCRIPTION.

On Rio Grande.

Land Segregated.

SE $\frac{1}{4}$ NE $\frac{1}{4}$	Sec. 1	T. 9	S. R.	3 W.	40	acres
NE $\frac{1}{4}$ SE $\frac{1}{4}$	" 1	" 9	" "	3 "	40	"
SW $\frac{1}{4}$ SE $\frac{1}{4}$	" 1	" 9	" "	3 "	40	"
Lot 5,	" 1	" 9	" "	3 "	35.70	"
SE $\frac{1}{4}$ SW $\frac{1}{4}$	" 1	" 9	" "	3 "	40	"
SE $\frac{1}{4}$ SE $\frac{1}{4}$	" 11	" 9	" "	3 "	40	"
NW $\frac{1}{4}$ NE $\frac{1}{4}$	" 12	" 9	" "	3 "	40	"
Lot 1	" 12	" 9	" "	3 "	24.15	"
Lot 2	" 12	" 9	" "	3 "	37.15	"
E $\frac{1}{2}$ of NW $\frac{1}{4}$	" 12	" 9	" "	3 "	80	"
SW $\frac{1}{4}$	" 12	" 9	" "	3 "	160	"
Lot 4	" 12	" 9	" "	3 "	46.05	"
Lot 3	" 12	" 9	" "	3 "	37.75	"
SW $\frac{1}{4}$ NW $\frac{1}{4}$	" 12	" 9	" "	3 "	40	"
NW $\frac{1}{4}$	" 13	" 9	" "	3 "	160	"
Lot 1	" 13	" 9	" "	3 "	38.10	"
Lot 2	" 13	" 9	" "	3 "	9.05	"
W $\frac{1}{2}$ SW $\frac{1}{4}$	" 13	" 9	" "	3 "	80	"
Lot 3	" 13	" 9	" "	3 "	39	"
Lot 4	" 13	" 9	" "	3 "	26.05	"
E $\frac{1}{2}$ NE $\frac{1}{4}$	" 14	" 9	" "	3 "	80	"
E $\frac{1}{2}$ SE $\frac{1}{4}$	" 14	" 9	" "	3 "	80	"
NE $\frac{1}{4}$	" 23	" 9	" "	3 "	160	"
E $\frac{1}{2}$ SW $\frac{1}{4}$	" 23	" 9	" "	3 "	80	"
N $\frac{1}{2}$ SE $\frac{1}{4}$	" 23	" 9	" "	3 "	80	"
Lot 1	" 23	" 9	" "	3 "	24	"
Lot 2	" 23	" 9	" "	3 "	38.90	"
W $\frac{1}{2}$ NW $\frac{1}{4}$	" 24	" 9	" "	3 "	80	"
Lot 1	" 24	" 9	" "	3 "	14.05	"
Lot 2	" 24	" 9	" "	3 "	15.01	"

NW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 24	T. 9 S. R. 3 W.	40	acres
Lot 4	" 24 " 9 " " 3 "	26.35	"
Lot 3	" 24 " 9 " " 3 "	14	"
Lot 1	" 25 " 9 " " 3 "	9.94	"
E $\frac{1}{2}$ NW $\frac{1}{4}$	" 26 " 9 " " 3 "	80	"
SW $\frac{1}{4}$ NE $\frac{1}{4}$	" 26 " 9 " " 3 "	40	"
Lot 1	" 26 " 9 " " 3 "	35.08	"
Lot 2	" 26 " 9 " " 3 "	7.05	"
W $\frac{1}{2}$ SE $\frac{1}{4}$	" 26 " 9 " " 3 "	80	"
Lot 3	" 26 " 9 " " 3 "	36.07	"
Lot 4	" 26 " 9 " " 3 "	30.15	"
SW $\frac{1}{4}$ NW $\frac{1}{4}$	" 26 " 9 " " 3 "	40	"
SW $\frac{1}{4}$	" 26 " 9 " " 3 "	160	"
E $\frac{1}{2}$ SE $\frac{1}{4}$	" 27 " 9 " " 3 "	80	"
SE $\frac{1}{4}$ SE $\frac{1}{4}$	" 33 " 9 " " 3 "	40	"
SW $\frac{1}{4}$	" 34 " 9 " " 3 "	160	"
E $\frac{1}{2}$ NE $\frac{1}{4}$	" 34 " 9 " " 3 "	80	"
SE $\frac{1}{4}$	" 34 " 9 " " 3 "	160	"
W $\frac{1}{2}$ NW $\frac{1}{4}$	" 35 " 9 " " 3 "	80	"
NE $\frac{1}{4}$ NW $\frac{1}{4}$	" 35 " 9 " " 3 "	40	"
Lot 1	" 35 " 9 " " 3 "	26.11	"
Lot 2	" 35 " 9 " " 3 "	32.30	"
Lot 3	" 35 " 9 " " 3 "	6.05	"
Lot 4	" 35 " 9 " " 3 "	39.01	"
Lot 5	" 35 " 9 " " 3 "	31.05	"
Lot 1	" 2 " 10 " " 3 "	2.76	"
Lot 1	" 3 " 10 " " 3 "	21.43	"
Lot 2	" 3 " 10 " " 3 "	27.97	"
Lot 3	" 3 " 10 " " 3 "	39.27	"
W $\frac{1}{2}$ NW $\frac{1}{4}$	" 3 " 10 " " 3 "	80	"
Lot 4	" 3 " 10 " " 3 "	22.24	"
Lot 5	" 3 " 10 " " 3 "	5.97	"
Lot 6	" 3 " 10 " " 3 "	31.08	"
Lot 1	" 4 " 10 " " 3 "	40.01	"

Lot 2	Sec. 4	T. 10	S. R.	3	W.	40.03 acres
Lot 5	" 4	" 10	" "	3	"	39.06 "
Lot 6	" 4	" 10	" "	3	"	16.36 "
SE $\frac{1}{4}$ NE $\frac{1}{4}$	" 4	" 10	" "	3	"	40 "
SE $\frac{1}{4}$ NW $\frac{1}{4}$	" 4	" 10	" "	3	"	40 "
W $\frac{1}{2}$ SW $\frac{1}{4}$	" 4	" 10	" "	3	"	80 "
Lot 7	" 4	" 10	" "	3	"	27.85 "
Lot 8	" 4	" 10	" "	3	"	19 "
SE $\frac{1}{4}$ SE $\frac{1}{4}$	" 5	" 10	" "	3	"	40 "
NE $\frac{1}{4}$ NE $\frac{1}{4}$	" 8	" 10	" "	3	"	40 "
W $\frac{1}{2}$ NW $\frac{1}{4}$	" 9	" 10	" "	3	"	80 "
W $\frac{1}{2}$ SW $\frac{1}{4}$	" 9	" 10	" "	3	"	80 "
Lot 1	" 9	" 10	" "	3	"	34.24 "
Lot 2	" 9	" 10	" "	3	"	3.04 "
Lot 3	" 9	" 10	" "	3	"	39.07 "
Lot 4	" 9	" 10	" "	3	"	33.07 "
Lot 5	" 9	" 10	" "	3	"	39.09 "
Lot 6	" 9	" 10	" "	3	"	10.08 "
Lot 7	" 9	" 10	" "	3	"	1.29 "
Lot 1	" 10	" 10	" "	3	"	2.36 "
Lot 1	" 15	" 10	" "	3	"	22.03 "
Lot 2	" 15	" 10	" "	3	"	22.01 "
Lot 3	" 15	" 10	" "	3	"	22.18 "
Lot 4	" 15	" 10	" "	3	"	22.25 "
NW $\frac{1}{4}$	" 16	" 10	" "	3	"	160 "
SW $\frac{1}{4}$	" 16	" 10	" "	3	"	160 "
S $\frac{1}{2}$ NE $\frac{1}{4}$	" 16	" 10	" "	3	"	80 "
N $\frac{1}{2}$ SE $\frac{1}{4}$	" 16	" 10	" "	3	"	80 "
SE $\frac{1}{4}$ SE $\frac{1}{4}$	" 16	" 10	" "	3	"	40 "
SW $\frac{1}{4}$ SE $\frac{1}{4}$	" 16	" 10	" "	3	"	40 "
Lot 2	" 16	" 10	" "	3	"	36.39 "
Lot 1	" 16	" 10	" "	3	"	33.37 "
E $\frac{1}{2}$ SE $\frac{1}{4}$	" 17	" 10	" "	3	"	80 "
NE $\frac{1}{4}$	" 20	" 10	" "	3	"	160 "

SE $\frac{1}{4}$	Sec. 20	T. 10	S. 8	R. 3	W. 160	acres
E $\frac{1}{2}$ NW $\frac{1}{4}$	" 20	" 10	" "	3 "	80	"
SW $\frac{1}{4}$ NW $\frac{1}{4}$	" 20	" 10	" "	3 "	40	"
E $\frac{1}{2}$ SW $\frac{1}{4}$	" 20	" 10	" "	3 "	80	"
SW $\frac{1}{4}$ SW $\frac{1}{4}$	" 20	" 10	" "	3 "	40	"
NE $\frac{1}{4}$	" 21	" 10	" "	3 "	160	"
NW $\frac{1}{4}$	" 21	" 10	" "	3 "	160	"
SW $\frac{1}{4}$	" 21	" 10	" "	3 "	160	"
W $\frac{1}{2}$ SE $\frac{1}{4}$	" 21	" 10	" "	3 "	80	"
NE $\frac{1}{4}$ SE $\frac{1}{4}$	" 21	" 10	" "	3 "	40	"
NW $\frac{1}{4}$	" 28	" 10	" "	3 "	160	"
NW $\frac{1}{4}$ NE $\frac{1}{4}$	" 28	" 10	" "	3 "	40	"
N $\frac{1}{2}$ SW $\frac{1}{4}$	" 28	" 10	" "	3 "	80	"
NE $\frac{1}{4}$	" 29	" 10	" "	3 "	160	"
SE $\frac{1}{4}$	" 29	" 10	" "	3 "	160	"
NW $\frac{1}{4}$	" 29	" 10	" "	3 "	160	"
NE $\frac{1}{4}$ SW $\frac{1}{4}$	" 29	" 10	" "	3 "	40	"
S $\frac{1}{2}$ SW $\frac{1}{4}$	" 29	" 10	" "	3 "	80	"
N $\frac{1}{2}$ NE $\frac{1}{4}$	" 32	" 10	" "	3 "	80	"
SE $\frac{1}{4}$ NE $\frac{1}{4}$	" 32	" 10	" "	3 "	40	"
SE $\frac{1}{4}$	" 32	" 10	" "	3 "	160	"
E $\frac{1}{2}$ NE $\frac{1}{4}$	" 32	" 10	" "	3 "	80	"
NW $\frac{1}{4}$ NW $\frac{1}{4}$	" 32	" 10	" "	3 "	40	"
S $\frac{1}{2}$ NE $\frac{1}{4}$	" 5	" 11	" "	3 "	80	"
Lot 1,	" 5	" 11	" "	3 "	43.01	"
Lot 2,	" 5	" 11	" "	3 "	43.03	"
SE $\frac{1}{4}$	" 5	" 11	" "	3 "	160	"
SE $\frac{1}{4}$ SW $\frac{1}{4}$	" 5	" 11	" "	3 "	40	"
NE $\frac{1}{4}$	" 7	" 11	" "	3 "	160	"
N $\frac{1}{2}$ SE $\frac{1}{4}$	" 7	" 11	" "	3 "	80	"
SW $\frac{1}{4}$ SE $\frac{1}{4}$	" 7	" 11	" "	3 "	40	"
W $\frac{1}{2}$ NE $\frac{1}{4}$	" 8	" 11	" "	3 "	80	"
NE $\frac{1}{4}$ NE $\frac{1}{4}$	" 8	" 11	" "	3 "	40	"
NW $\frac{1}{4}$	" 8	" 11	" "	3 "	160	"

SE $\frac{1}{4}$ SW $\frac{1}{4}$	Sec. 8	T. 11	S. R. 3	W. 40	acres
W $\frac{1}{2}$ SW $\frac{1}{4}$	" 8	" 11	" " 3	" 80	"
NW $\frac{1}{4}$	" 17	" 11	" " 3	" 160	"

Area Segregated 8,507.14 "

New Mexico.

Reservoir Site No. 39 (Plat No. 39.) Recommended
for Segregation in letter dated Feb. 27, 1891. T. 15
S. R. 4 W. and 16 S. R. 4 W.

New Mexico Principal Meridian.

DESCRIPTION.

On Rio Grande.

Lands segregated.

S $\frac{1}{2}$ SE $\frac{1}{4}$	Sec. 5	T. 15	S. R. 4	W. 80	acres
SE $\frac{1}{4}$ SW $\frac{1}{4}$	" 5	" 15	" " 4	" 40	"
S $\frac{1}{2}$	" 8	" 15	" " 4	" 320	"
NE $\frac{1}{4}$	" 8	" 15	" " 4	" 160	"
E $\frac{1}{2}$ NW $\frac{1}{4}$	" 8	" 15	" " 4	" 80	"
SW $\frac{1}{4}$ NW $\frac{1}{4}$	" 8	" 15	" " 4	" 40	"
Entire	" 17	" 15	" " 4	" 640	"
E $\frac{1}{2}$	" 20	" 15	" " 4	" 320	"
NE $\frac{1}{4}$ NW $\frac{1}{4}$	" 20	" 15	" " 4	" 40	"
SE $\frac{1}{4}$ SW $\frac{1}{4}$	" 20	" 15	" " 4	" 40	"
E $\frac{1}{2}$	" 29	" 15	" " 4	" 320	"
S $\frac{1}{2}$ NW $\frac{1}{4}$	" 29	" 15	" " 4	" 80	"
NE $\frac{1}{4}$ NW $\frac{1}{4}$	" 29	" 15	" " 4	" 40	"
SE $\frac{1}{4}$ NE $\frac{1}{4}$	" 30	" 15	" " 4	" 40	"
SE $\frac{1}{4}$	" 30	" 15	" " 4	" 160	"
E $\frac{1}{2}$	" 31	" 15	" " 4	" 320	"
W $\frac{1}{2}$	" 32	" 15	" " 4	" 320	"
W $\frac{1}{2}$ NE $\frac{1}{4}$	" 32	" 15	" " 4	" 80	"
W $\frac{1}{2}$ SE $\frac{1}{4}$	" 32	" 15	" " 4	" 80	"
SE $\frac{1}{4}$ SE $\frac{1}{4}$	" 32	" 15	" " 4	" 40	"

Entire	Sec. 5	T. 16 S.	R. 4 W.	640	acres
E $\frac{1}{2}$	" 6	" 16 "	" 4 "	320	"
SE $\frac{1}{4}$ SW $\frac{1}{4}$	" 6	" 16 "	" 4 "	40	"
E $\frac{1}{2}$	" 7	" 16 "	" 4 "	320	"
E $\frac{1}{2}$ NW $\frac{1}{4}$	" 7	" 16 "	" 4 "	80	"
E $\frac{1}{2}$ SW $\frac{1}{4}$	" 7	" 16 "	" 4 "	80	"
Entire	" 8	" 16 "	" 4 "	640	"
W $\frac{1}{2}$	" 17	" 16 "	" 4 "	320	"
W $\frac{1}{2}$ NE $\frac{1}{4}$	" 17	" 16 "	" 4 "	80	"
W $\frac{1}{2}$ SE $\frac{1}{4}$	" 17	" 16 "	" 4 "	80	"
E $\frac{1}{2}$	" 18	" 16 "	" 4 "	320	"
N $\frac{1}{2}$ NE $\frac{1}{4}$	" 19	" 16 "	" 4 "	80	"
SE $\frac{1}{4}$ NE $\frac{1}{4}$	" 19	" 16 "	" 4 "	40	"
NW $\frac{1}{4}$	" 20	" 16 "	" 4 "	160	"
N $\frac{1}{2}$ SW $\frac{1}{4}$	" 20	" 16 "	" 4 "	80	"

Area segregated.....6 540 Acres.

5.60 acres were added, see sec. 8 and 17 T 16 S 4 N.

New Mexico.

Reservoir Site No. 37 (Plat No. 37.) Recommended for segregated in letter dated Feby. 27, 1891. Township 8 S. range 8 W. New Mexico Principal Meridian.

DESCRIPTION.

On Hot Springs Indian Reservation.

Lands segregated.

SW $\frac{1}{4}$ NW $\frac{1}{4}$	Sec. 25	T. 8 S.	R. 8 W.	40	acres
Lot 4	" 25	" 8 "	" 8 "	22.98	"
Lot 3	" 25	" 8 "	" 8 "	22.92	"
S $\frac{1}{2}$ NE $\frac{1}{4}$	" 26	" 8 "	" 8 "	80	"
NW $\frac{1}{4}$ NE $\frac{1}{4}$	" 26	" 8 "	" 8 "	40	"
E $\frac{1}{2}$ NW $\frac{1}{4}$	" 26	" 8 "	" 8 "	80	"
Lot 1.	" 26	" 8 "	" 8 "	22.96	"
Lot 2.	" 26	" 8 "	" 8 "	22.89	"

Area segregated.....371.73 acres.

Remainder of reservoir on Hot Springs, Indian Reservation.

United States Land Office, }
Las Cruces, N. M., June 22, 1897. }

I hereby certify that the foregoing nine pages hereto attached, are a true, correct and complete copy of the original Departmental Letter dated "C" November 14, 1891, now on file in this office.

EDWIN E. SLUDER,
Register.

EXHIBIT "B."

[Copy.]

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C., August 18, 1894.

The Commissioner of the General Land Office.

Sir: In the matter of the selection of the following reservoir sites, the abstracts furnished by your office show that a large part of each is not subject to reservation for the purpose intended, an account of previous dispositions and the attention of the Director of the Geological Survey has been called thereto.

Under date of May 25, 1892, he reports, however, that in the near future, all of these sites will be needed for the storage of waters for public purposes, and that while some of the lands covered by the sites will have to be acquired by condemnation, or other means, before the remaining lands can be used for reservoir purposes, and the future necessities must demand their acquirement in maintaining a proper storage of water, if open to entry under the general land laws.

Under this view, I have to direct that all lands covered by these sites, which are legally subject to reservation, continue withdrawn from disposition to await

further action by Congress in the matter of these reservoir sites.

Proper notations should be made upon your records and the local officers advised accordingly.

The sites referred to are as follows:

Colorado.

Reservoir Sites Nos. 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 19, 21, 25, 27, 28, 30, 31, 33, 37, 40, 41, 42, 43, 46, 48, 50, 51, 53 and 55.

New Mexico:

Reservoir Sites Nos. 7, 31, 32, 33, 34, 36, 38, and 39.

The papers relating to these sites are herewith returned.

Very respectfully,
HOKE SMITH,
Secretary.

"A."

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE.

WASHINGTON, D. C., August 18, 1894.

The Commissioner of the General Land Office:

Sir: In the matter of Reservoir Site No. 37 in the Las Cruces land district, New Mexico, selected by the Director of the Geological Survey, it appears that the greater portion of the lands it is desired to reserve, lies within the Hot Springs Indian reservation.

Under date of May 25, 1892, the Director returns the papers relative to said site, accompanied by a statement in which the lands desired to be reserved in said Indian reservation are designated by legal subdivisions of independent sections placed upon said reservation for the purpose of identifying the lands desired to be reserved.

From this date the lands can be clearly identified, and I therefore approve of the selection and direct that all lands legally subject to reservation, covered by said sites, be withdrawn from this position to await further action of Congress in the matter of reservoir sites.

To this end you will make proper notes upon your office records and advise the local officers accordingly.

The papers relating to the site are herewith returned.

Very respectfully,

HOKE SMITH,
Secretary.

"C."

DEPARTMENT OF THE INTERIOR.

GENERAL LAND OFFICE,

WASHINGTON, D. C. Sept. 26, 1894.

Registrar and Receiver, Las Cruces, New Mexico:

GENTLEMEN: By letter "C" of November 14, 1891, "copies of selections of lands in your district, made by the Director of the Geological Survey, for permanent sites for irrigating reservoirs, under Acts of Congress of October 2, 1888, August 30, 1890, and March 3, 1891," were transmitted to your office and you were directed not to allow entries or filings for any of the tracts covered by said selections, until further advised.

By letter August 18, 1894, the Honorable Secretary of the Interior returned the papers in the reservoir site No. 37, embracing lands in Sec. 25 and 26, T. 8 S. R. 8 W., and lands within the Hot Spring Indian reservation, in Tps. 8 and 9 S., R. 7 and 8 W., designated by the Director of the Geological Survey, by "legal subdivisions of independent sections, placed upon said reservation for the purpose of identifying the lands desired to be reserved," with his approval. It is di-

rected by the Honorable Secretary that "all lands legally subject to reservation covered by said site, be withdrawn from disposition, to await the further action of Congress in the matter of reservoir sites."

A copy of said letter of August 18, 1894, is herewith enclosed, and as directed therein, the lands covered by said site No. 37, are continued withdrawn from disposition, and you will be governed accordingly.

Very respectfully,

S. W. LAMOREAU,
Commissioner.

"A."

DEPARTMENT OF THE INTERIOR.

WASHINGTON, D. C., November 8, 1894.

Register and Receiver, Las Cruces, New Mexico.

SIRS: Referring to your letter of Oct. 2, 1894, in reply to office letter of Sep. 26, relating to certain reservoir sites, you are advised that those sites were selected by the Director of the Geological Survey, under the act of Aug. 30, 1890, (26 Stat., 371-391, also General Circular, p. 71), and are reserved from entry or settlement until otherwise provided by law. These sites have always been designated by number, and your office has had instructions regarding them in former letters. You will carry out the instructions of office letter of Sep. 26, 1894.

Under Secs. 18 to 21, Act of Mch. 3, 1891, (26 Stat., 1095) corporations, individuals and associations of individuals, filed certain maps and papers, in conformity with the regulations of Feb. 20, 1884, as applications for right of way for canals and reservoirs for irrigation purposes, which are to be noted on the local office records, as required in paragraph 25. These applications are submitted to the Honorable Secretary for his ap-

proval. When they are approved, copies of the map are sent to the local offices and there noted on the records; see paragraph 26, circular Feb. 20, 1894. The public land crossed by such approved rights of way may be disposed of in the usual manner, subject to such rights of way. These are not numbered, and record is kept of them in the usual manner, as of application and correspondence generally, and by the notations required by the circular as above. These rights of way resemble in character and incidents the railroad rights of way, there being but few essential differences.

Very respectfully,

EDWIN A. BOWERS,
Acting Commissioner.

UNITED STATES LAND OFFICE.

LAS CRUCES, New Mexico, June 22nd, 1897.

I hereby certify that the foregoing copies of letters hereto attached, first, of date of August 18, 1894, from Hoke Smith, Secretary, in reference to reservoir sites in Colorado and New Mexico; second, of same date, from same party, marked A. in reference reservoir site No. 37; third, of date Sep. 26, 1894, from S. W. Lamoreaux, marked "C," in reference to reservoir site No. 37, and fourth, under date of Nov. 8th, 1894, from Edwin A. Bowers, Acting Commissioner, marked F, in answer to office letter Oct. 2nd. 1894, are true and correct copies of the originals now on file in this office.

EDWIN E. SLUDER,
Register.

EXHIBIT "H-1."

[Copy.]

LAS CRUCES, New Mexico, June 18, 1897.

To the Honorable Secretary of the Interior, Washington, D. C.

SIR:—Under and in accordance with a resolution of

instructions of the board of directors of this company made this day, copy of which is hereto attached, application is hereby made for and on behalf of The Rio Grande Dam & Irrigation Company, under the chapter 335, "Entitled an Act to provide for the use and occupation of reservoir sites reserved," for the granting to this company for use as reservoir sites, the land embraced in those certain reservoir sites heretofore surveyed and segregated by the United States Government and designated as "U. S. Reservoir Survey No. 38" and "U. S. Reservoir Survey No. 39," situated in the bed of the Rio Grande and being in the counties of Sierra and of Socorro, respectively, in the Territory of New Mexico, and further designated by the Commissioner of the General Land Office by letter "C," of November 14, 1891, addressed to Register and Receiver, Las Cruces, New Mexico.

Applicant states that inasmuch as the articles of incorporation and other corporate papers are on file in the office of and approved by the Honorable Secretary of the Interior, it does not forward such papers with this application, and inasmuch as the reservoir sites above applied for have already been thoroughly surveyed and segregated by and at the expense of the U. S. Government and the boundaries thereof thoroughly marked and delineated, and inasmuch as this applicant by occupying said sites under said Act so embraced in said chapter 335 will take the same under the restrictions therein contained, applicant has assumed that it is entitled to said reservoir sites without any further survey thereof, but applicant hereby expresses its desire to comply with the rulings of the Honorable Secretary of the Interior concerning such survey under event the Honorable Secretary is of the

opinion that such surveys are necessary, and the applicant hereby expresses its intention of making the same in good faith as required by the Honorable Secretary, and hereby requestes instructions as to any requirements in such matter and the extension to this applicant of a sufficient length of time in which to comply with such requirements.

THE RIO GRANDE DAM & IRRIGATION CO.

[SEAL] (Signed) BY EDWIN C. ROBERTS.
President.

Attested:

(Signed) W. T. JOHNS.

Territory of New Mexico, {
County of Doña Ana. }

Edwin C. Roberts, being duly sworn, on his oath, says: That he is the president of the Rio Grande Dam & Irrigation Company organized under the laws of the Territory of New Mexico; that W. T. Johns, whose name is signed above is the secretary of said company and that the seal affixed is the seal of said company; that the reservoir sites named in the above communication were on the 18th day of June, A. D. 1897, at a meeting of the directors of said company, adopted as reservoir of said company, as per a copy of the minutes of said directors' meeting hereto attached, and to be bounded and described as at present bounded and described in the United States Government Survey thereof. And further affiant saith not.

(Signed) EDWIN C. ROBERTS.

Sworn to and subscribed before me this 18th day of June, 1897.

(Signed) EDWIN E. SLUDER,
Register.

[SEAL.]

Resolved, by the directors of this company, that this company should proceed, in accordance with the privilege extended by the Act of Congress of the United States, approved February 26, 1897, entitled, "An Act to provide for the use and occupation of reservoir sites reserved," same being Chapter 335 of the Acts of 1897, to acquire the land embraced in U. S. Reservoir Sur. No. 38 and U. S. Reservoir Sur. No. 39, lying and being in the bed of the Rio Grande river, in the counties of Sierra and Socorro, in the Territory of New Mexico, and to this end the president of this company, is hereby instructed to file application with the Honorable Secretary of the Interior, therefor, and such reservoir sites so surveyed and segregated and platted on the Government maps are hereby adopted as reservoir sites of this company.

(Signed)

W. T. JOHNS,

Secretary.

U. S. LAND OFFICE.

LAS CRUCES, N. M., June 21, 1897.

I hereby certify that the foregoing and hereto attached, is a true, correct and complete copy of application filed June 18, 1897, by The Rio Grande Dam & Irrigation Company, for entry of U. S. Reservoir Sites described as Surveys Nos. 38 and 39.

EDWIN E. SLUDER,

Register.

EXHIBIT "G."

DEPARTMENT OF STATE.

INTERNATIONAL (WATER) BOUNDARY COMMISSION,

United States and Mexico.

Treaties of 1884 and 1889.

EL PASO, Texas, November 17, 1896.

To the Honorable Secretary of State, Washington, D. C.

Sir: Referring to your letter of August 8th, transmitting copy of a petition addressed to this government by Don Andres Horcasitas, attorney of the inhabitants of Paso del Norte, Mexico, in which he requests the Mexican government to recommend to that of the United States the suspension of all work in the Rio Bravo (Grande) by the Rio Grande Irrigation Company, Limited, and your request for suggestions from me on the subject, I beg to submit herewith my report on the matter.

As stated to you in my last letter of October 29th, I have withheld this report of necessity because the investigations going on by the engineers of the Joint Commission regarding the amount of water taken out by the Americans and the former flow of the river, year by year, had not been completed up to this date, and it was impossible for me to make an intelligent report until they were.

With your permission I called upon the Secretary of the Interior when in Washington and learned what I could about the status of this Rio Grande Irrigation Company, Limited, and found that on February 1, 1895, the Secretary of the Interior—then Mr. Hoke Smith—had approved the application for said company for right of way “subject to any valid interfering rights with the right of way on account of the proposed reservoir.” (See copy enclosed, marked “A.”) Just what significance this reservation of “valid interfering rights” may have I am unable to understand, but certainly according to common law it should be understood that there should be no interference with any prior appropriation of water below the proposed dam and reservoir.

This proposed dam and reservoir is at a location called Elephant Butte, about 125 miles above El Paso, a distance so great that in this arid climate it is utterly impracticable to carry water to this vicinity, and consequently could be of no benefit to agricultural interests here, notwithstanding the statements in their prospectus that they propose to provide water not only here in Texas but on the Mexican side of the river.

At the same time I learned that this same company had on file applications for two additional dams and reservoirs, one at Rincon, New Mexico, about 100 miles above El Paso, and another at Fort Selden, about 60 miles above.

At the latter place a gentleman by the name of Ernest Dale Owens had also an application on file at the same point as the Rio Grande Land and Irrigation Company, which antedated all the applications of the last mentioned company.

For a full understanding of the status of these three last mentioned applications, I beg to refer to a communication from the Commissioner of the General Land Office to the Secretary of the Interior, dated August 15, 1896, fully discussing their relative merits. (Copy herewith enclosed, marked 'B.')

The Secretary had, when I met him, under consideration, and was about determining the question as to approval or disapproval of these three last applications, but at my verbal suggestion he promised to hold them until my letter to you of October 29th, hereinbefore mentioned, should be referred to him by your department.

The investigations of the engineers of the Joint Commission into the amount of water taken from the Rio Grande and its tributaries in Colorado and New Mexico

since prior to 1880 up to this date, show that prior to 1880 there were in Colorado 511 canals, using 471,000 acre feet, and irrigating 121,000 acres of land. That this number of ditches and amount of land irrigated kept increasing year by year, until at this date there are 925 canals using 556 000 acre feet of water and irrigating 318,000 acres of land.

In New Mexico, there were prior to 1880, 563 canals, using 597.000 acre feet of water and irrigating 183,000 acres of land, and at the present date there are 603 canals, using 388,000 acre feet of water and irrigating 186.000 acres of land.

It will be observed here that the greatest increase in canals and irrigation for the past sixteen years has been in Colorado. As there was prior to 1880, a scarcity of water in the Rio Grande at El Paso and in fact a dry river once in about seven years, it is clear that any increased use of water above El Paso would increase that scarcity. 1879 was the dryest year of record prior to 1889. In 1889 the river was dry as far north as Albuquerque; since 1889 the river has been low at El Paso every year but one, namely, 1891, and dry during a large part of several years. The dry river of 1889 lasted longer than any of the others; no water passed El Paso that summer for over four months. The water fell earlier in the spring of 1896 than ever; the flow, which had been small all of the spring, ceasing May 26th, but the copious rains on the New Mexican drainage sent down water in July, and the flow of the river was intermittent after that date. Floods are not so frequent as in former years, the last destructive one occurring in 1884. There was a small flood in 1891, but it was not so large as that of 1884.

The records of the flow of the river for the past 16 years are very meagre, that for 11 months prior to March 31, 1890, was 450,000 acre feet. This includes the long drought of 1889. For the year ending March 31, 1891, the flow was 1,100,000 acre feet; for 1892, 1,850,000 acre feet. and for 1893. 875 - 000 acre feet.

What has been stated above is a very brief extract from the large mass of information and statistics taken by our engineers from which I form the following conclusions.

That the probable flow of water in the river here is likely to be ample for the supply of the proposed international reservoir after deductions are made for all the small reservoirs that are likely to be constructed for the storage in Colorado, and the probable increase of canals in Colorado and New Mexico; but that the flow will not be sufficient to supply the proposed international reservoir here and allow for the supply for the proposed reservoir of The Rio Grande Irrigation Company, Limited, at Elephant Butte, in New Mexico, or any other similar reservoirs in New Mexico. and but one of these schemes can be successfully carried out.

The general results that the Joint Commission are now arriving at, concerning the flow of the river, from the investigations of the engineers are: That the flow here at El Paso, has been decreased by the appropriation of waters above, in the last 16 years about 1,000 second feet. and that the water appropriated by the citizens of Mexico for over forty years past in the valley of El Paso amounted to about 400 second feet. and that that appropriated by the citizens of the United States in the same valley for the same length of time amounts to about 350 second feet. All

this of course is approximate, but is as near correct as can possibly be arrived at by any data or evidence now available.

I would therefore suggest that these papers be referred to the Hon. Secretary of the Interior with the request that no further grants for reservoirs be made in New Mexico, and that if practicable, the approval of the reservoir of the Rio Grande Land and Irrigation Company, Limited, at Elephant Butte be canceled or withdrawn, and if not practicable to cancel or withdraw the same, that such executive and legislative restriction be placed upon it as to prohibit it from using any part of the flow of the river to which the inhabitants of either bank of the river below may have a prior right by appropriation, and that some prompt and efficient remedy be provided the possessors of these prior rights by appropriation in case the company should use any water to which the inhabitants above referred to are entitled.

As I understand the matter the irrigation laws are so imperfect and crude at this date, that even in the same state or territory there is no effective legal remedy when water is thus injuriously appropriated, and in separate states it is still more difficult, while to the inhabitants of Mexico, it would be impossible to make any successful effort at redress.

I return herewith copy of the protest with attached papers, among which I beg to call attention to the letter of W. E. Baker, dated Las Cruces, N. M., July 12, 1895, who I understand has charge of the land office there, in which letter he states that the only "patent" for the Elephant Butte reservoir of the Rio Grande Dam & Irrigation Company consists of the words "Department of the Interior, Washington D. C. February 1,

1895. Approved subject to any valid existing rights. Hoke Smith, Secretary." This is broader and more comprehensive than the words used in the enclosed letter marked "A," regarding the reservation of rights, and is probably the exact language given to the promoters of the Rio Grande Dam & Irrigation Company, Limited.

ANSON MILLS,

Col. 3d Cav. U. S. A., Commissioner.

EXHIBIT "G."

DEPARTMENT OF STATE.

WASHINGTON, Nov. 30, 1896.

The Honorable Secretary of the Interior.

SIR:—I have the honor to invite your attention to the enclosed copy of a letter dated November 17, 1896, and accompanying papers from Col. Anson Mills, of the U. S. Army, who is a member of a Joint Commission appointed by the U. S. and the Republic of Mexico to report upon the best and most feasible mode—whether by a dam across the Rio Grande river near El Paso, Texas, or otherwise—of so regulating the use of the waters of the Rio Grande river as to secure to each country and its inhabitants their legal and equitable rights and interests in said waters for irrigation purposes.

This examining board was appointed in pursuance of a concurrent resolution of Congress, approved April 29, 1890, which recites the fact that by reason of the irrigating ditches and canals leading from the upper waters of the Rio Grande in the State of Colorado and Territory of New Mexico, an insufficient quantity of water remains in the river to irrigate the lands adjacent to the river after it leaves New Mexico, thereby rendering the lands arid and unproductive to the great detriment of the citizens of both countries who live along the Rio

Grande below the line of New Mexico. The resolution then authorizes the President to enter into negotiations with the government of Mexico with a view to remedy this condition. I enclose a copy of the resolution.

The duty imposed upon this board of examiners was to ascertain:

(1) The amount of water taken from the Rio Grande by the irrigation canals constructed in the United States.

(2.) The average amount of water in said river from year to year before the construction of said irrigation canals and since their construction.

(3.) The best and most practicable mode of regulating the use of the waters of the Rio Grande so as to secure to each country and to the land owners on both sides of the river their legal and equitable rights and interests in said waters.

August 4th last, the Mexican Minister to the United States transmitted to this department a copy of a petition forwarded by the inhabitants of the city of Paso del Norte, Mexico, calling attention to the distressing situation in the towns on the Mexican side of the Rio Grande caused by the immoderate use of the waters of the river for irrigation purposes by the adjacent owners in the United States above the boundary line. This petition states that the efforts of the two governments to remedy this condition will be fruitless if, in addition to the 40 dams already existing in Colorado, the Rio Grande Irrigation and Land Company, Limited, should be permitted to construct, as it proposes, a dam across the Rio Grande at Elephant Butte in New Mexico. The Mexican Minister said that his government regarded this petition as well founded, and requested the United

States to adopt such measures as may be in its power to put a stop to the works undertaken by the Rio Grande Irrigation and Land Company, Limited, until the effect of that company's proposed works upon the practicability of the international scheme could be considered by the examining board and determined upon to the satisfaction of the two governments. A copy of the Mexican petition was sent to Col. Mills for his suggestions. The enclosed letter of November 17, 1896, to which your attention is invited, is his reply.

Col. Mills says that the proposed dam and reservoir of the Rio Grande Irrigation and Land Company is located about 125 miles above El Paso, and that it will be useless, at that distance, to furnish water for irrigation in the vicinity of El Paso and below. He says furthermore that he is informed that the same company has dams and reservoirs, one at Rincon, New Mexico, about 100 miles above El Paso, and another at Fort Seldon, about 60 miles above; also that at the latter place a man named Ernest Dale Owen has applied for permission to erect a dam and reservoir.

It is understood that the Rio Grande Irrigation and Land Company, Limited, acquired its right to build the reservoir it is now constructing, from a corporation existing under the laws of New Mexico under the name of the "Rio Grande Dam and Irrigation Company," to which company the right of way for the construction of the storage dam at Elephant Butte was granted by the Secretary of the Interior, February 1, 1895, under the provisions of the Act of March 3, 1891.

Col. Mills gives it as his opinion that the probable flow of water in the river will be sufficient to supply the proposed international reservoir after deducting for all the small reservoirs now in operation and likely to

be constructed above, but that the flow will not be sufficient to supply the proposed international reservoir and allow for the supply of the proposed reservoir of the Rio Grande Irrigation and Land Company, Limited, at Elephant Butte, or any other reservoirs upon the same scale, and that the scheme to build an international reservoir will have to be abandoned unless the completion of the works proposed by the Rio Grande Irrigation and Land Company, Limited, and by Owen, is prevented. Col. Mills' letter suggests that the rights obtained from the United States by the Rio Grande Irrigation and Land Company, Limited, may be subject to conditions in favor of the rights of those who live below, which on a proper showing might enable the Secretary of the Interior to cancel the grant made to that company. The other applications for permission to build reservoirs for storage of the waters of the Rio Grande mentioned by Col. Mills have not, it is assumed, yet been finally acted upon.

The circumstances being as above stated, I desire to suggest the propriety of declining to grant any additional rights to build dams and reservoirs as applied for—certainly until the negotiations now pending between Mexico and the United States have reached a final conclusion. I desire also to suggest that an investigation may be made of the rights granted to the Rio Grande Irrigation and Land Company, Limited, or any acts or proceedings done by that company by virtue of such rights, with a view to ascertaining whether there is any legal power to cancel those rights, and, if the power exists, whether it can be exercised without injustice to the parties directly and indirectly interested in that enterprise.

With a request for your earliest practicable attention to this matter,

I have the honor to be, Sir,

Your obedient servant,

RICHARD OLNEY.

EXHIBIT "F."

DEPARTMENT OF STATE.

WASHINGTON, January 11, 1897.

The Hon. Secretary of the Interior.

SIR: In your letter of December 19, 1896, relative to the reservoir which the Rio Grande Dam & Irrigation Company, or another corporation claiming the rights of that company, intends to build at Elephant Butte, New Mexico, you informed me that you had, in compliance with my suggestions of November 30, 1896, directed the Commissioner of the General Land Office to suspend action on any and all applications for right of way through public lands for the purpose of irrigation by using the waters of the Rio Grande river or any of its tributaries in the State of Colorado or in the Territory of New Mexico until further instructions from you. The request of this Department, upon which your order was based, was made at the suggestion of Col. Anson Mills, a copy of whose letter, dated October 29, 1896, was transmitted to you October 31 of that year.

(Here the Secretary suggests modification of said order of suspension in so far as it applies to Pecos River.)

There is another phase of this question, which it has occurred to me may have an important bearing upon the rights of parties now applying for permission to erect dams across the Rio Grande, and also upon the international question involved. I have information

which indicates that the Rio Grande river in some parts above the international boundary line is and has been used as a waterway for navigation between the United States and Mexico, and possibly between the State of Colorado and the Territory of New Mexico. If it be true that this stream in its natural condition is capable of use for the transportation of commerce between two States of the Union, or between the United States and a foreign country, the river is a navigable water of the United States, and as such, subject to the laws of Congress enacted for the maintenance, protection and preservation of the navigable waters of the United States. One of the principal matters of complaint by Mexico, is that the diversion of the upper waters of the Rio Grande for irrigation purposes, has affected the usefulness of that stream as a waterway for commerce.

The Attorney General in his opinion of December 12, 1895, (21 Op. 274) held that the river was not navigable above the boundary, in the sense of the treaty between the United States and Mexico; but the question here is, whether it is navigable within the meaning of the laws of the United States. The condition of navigability within the meaning of our statutes, are well defined in the decisions of Federal courts. Many of these are referred to in 20 Op. 101.

If the Rio Grande river is in the part under consideration, a navigable water of the United States, the question arises, whether the erection of the proposed dam across it, will not interfere with its navigability, and bring these dams within the prohibition of the statute, enacted for the preservation of navigable waters. I refer particularly, to the Act of September 19, 1890, Secs. 7 and 10, (26 Stat. 426) and to the Act of July 13, 1892, Sec. 3, (27 Stat. 110). It is true

that the enforcement of these statutes devolves primarily upon the Secretary of War, and that at first view, it may not appear to be a part of the duty of the Secretary of the Interior, to take care of the navigability of the streams on the public lands; but in a case where the act of the Secretary of the Interior approving the right of way to build a dam across the river on the public lands may operate, as it must if the river is a navigable water of the United States, as a grant of Executive sanction to a proceeding which is in violation of law, it would seem to be the duty and within the jurisdiction of the Secretary of the Interior to ascertain before sanctioning the erection of the dam, whether it would constitute an obstruction to a navigable water of the United States and be within the prohibition of the statutes.

As the erection of the dams under consideration is now the subject-matter of a complaint of the government of Mexico, I feel it my duty to lay this question before you in order that you may determine in the first place whether you have the power, and in the second place whether it is a part of your duty to withhold approval of the pending applications for right of way to build dams across the Rio Grande river and its tributaries above the boundary line until the applicants have satisfied you that the river in the part affected by these dams, is not a navigable water of the United States, or that the dams will not interfere with the navigation of the river. It must be observed that the obstruction to navigation may result not only from the intervention of the dam across the river, but also from the diversion of the waters, leaving an insufficient quantity below the dam for the purposes of navigation.

I have the honor to be,

Your obedient servant,

RICHARD OLNEY.

United States of America, }
 Territory of New Mexico, }
 3d Judicial Dist. Court. }

Be it remembered, that on the 24th day of May, A. D. 1897, there was entered of record in the United States District Court of the Third Judicial District of the Territory of New Mexico, an order, which said order is in words and figures as follows to-wit:

United States of America, }
 No. 140. vs. }
 The Rio Grande Dam & Irrigation Company. }

Upon the filing and reading of the bill of complaint in the foregoing cause, it is ordered that a temporary writ of injunction issue against the defendant, The Rio Grande Dam & Irrigation Company, as prayed for in said bill, and it is further ordered that said defendant show cause, if any it have, before me in chambers, on Monday the 14th day of June, 1897, why said injunction should not be continued in force until the final hearing of the cause or should be dissolved.

Done in chambers this 24th day of May, A. D. 1897.

GIDEON D. BANTZ,
 Judge, etc.

And be it further remembered that afterwards, to-wit: on the 25th day of June, A. D. 1897, in the said United States District Court, the following proceedings were had and entered of record, to-wit:

In the United States District Court of the Third Judicial District of the Territory of New Mexico—In Vacation—At Chambers. Present:

GIDEON D. BANTZ,
 Judge and Chancellor.

W. B. CHILDERS, Esq.,
 United States Attorney.

W. B. WALTON.

Clerk.

United States of America	}	Chancery.
No. 140. vs.		
The Rio Grande Dam & Irriga-		
tion Company, et al.		

Comes now the United States of America, by W. B. Childers, Esq., its district attorney, and with him by courtesy appearing T. A. Falvey, Esq., and W. B. Brack, Esq., in aid of the said district attorney.

And now comes W. A. Hawkins, Esq., Albert B. Fall, Esq., and S. B. Newcomb, Esq., and enter their appearance as solicitors for the respondents herein.

And now this cause coming on to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force, heretofore made and entered of record in this cause, and respondents' motion to dissolve said injunction, heretofore filed herein, and the court having heard arguments of counsel, and this hearing not being concluded, it is continued until to-morrow morning at nine o'clock.

Now the court appoints H. B. Holt as special stenographer to the court for the hearing of this cause, and he is duly sworn to well and truly serve as such.

It is ordered that hearing adjourn until to-morrow morning at nine o'clock.

And be it further remembered that afterwards, to-wit: on the 26th day of June, A. D. 1897, in the said United States District Court, the following proceedings were had and entered of record, to-wit:

Hearing resumed pursuant to adjournment, present and presiding as of yesterday.

United States of America	}	Chancery.
No. 140. vs.		
The Rio Grande Dam & Irriga-		
tion Company, et al.		

And now this cause coming on further to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force, made and entered of record in this cause, and respondents' motion to dissolve said injunction heretofore filed herein, and the court having heard arguments of counsel, and this hearing not being concluded, it is continued until Monday morning at nine o'clock.

It is ordered that hearing adjourn until Monday morning at nine o'clock.

And be it further remembered that afterwards, to-wit: on the 28th day of June, A. D. 1897, in the said United States District Court, the following proceedings were had and entered of record, to-wit:

Hearing resumed pursuant to adjournment, present and presiding as of Saturday.

United States of America,	} Chancery.
No. 140. vs.	
The Rio Grande Dam & Irrigation Company, et al.	

And now this cause coming on further to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force, made and entered of record in this cause, and respondents' motion to dissolve said injunction, heretofore filed herein, and the court having heard arguments of counsel, and this hearing not being concluded, it is continued until to-morrow morning at nine o'clock.

It is ordered that hearing adjourn until to-morrow morning at nine o'clock.

And be it further remembered that afterwards, to-wit: on the 29th day of June, A. D. 1897, in the said United

States District Court, the following proceedings were had and entered of record, to-wit:

Hearing resumed pursuant to adjournment, present and presiding as of yesterday.

United States of America,	}	Chancery.
No. 140. vs.		
The Rio Grande Dam & Irrigation Company, et al.		

And now this cause coming on further to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force, made and entered of record in this cause, and respondents' motion to dissolve said injunction, heretofore filed herein, and the court having heard all the arguments of counsel, and this hearing being concluded, the court doth reserve his decision herein until a future date.

And be it further remembered that afterwards, to-wit: on the 3rd day of July, A. D. 1897. there was entered of record, in the said United States District Court, an order which said order is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico—In Vacation—At Chambers,

United States of America,	}	Chancery.
No. 140. vs.		
The Rio Grande Dam & Irrigation Company, et al.		

And now this cause coming on further to be heard on the order to show cause, why the temporary injunction heretofore granted herein, should not be continued in force, made and entered of record in this cause, and the motion to dissolve said injunction heretofore filed herein, and the court having heretofore heard all the

arguments of counsel, and being fully advised in the premises, doth sustain said motion.

It is therefore ordered by the court, that the motion to dissolve the injunction, heretofore filed by respondents in this cause, be and the same is hereby sustained, and that the injunction heretofore granted herein, be and the same is hereby dissolved.

GIDEON D. BANTZ.

Judge and Chancellor.

And be it further remembered that afterwards, to-wit: on the 31st day of July, A. D., 1897, there was entered of record in the said United States District Court, an order, which said order is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States.

United States of America,	}
Complainant,	
No. 140. vs.	
Rio Grande Dam & Irrigation	
Company, et. al.,	}
Defendants.	

ORDER.

It is ordered by the court that the complainant, the United States of America, be and it is hereby permitted to file and make a part of the record in said cause, and that the same be considered as part thereof for the purpose of the hearing upon the rule heretofore made upon the defendant, The Rio Grande Dam & Irrigation Company, upon the filing of the original bill in this cause, to show cause why an injunction theretofore issued, should not be issued, the articles of incor-

poration of the said Rio Grande Dam & Irrigation Company and a copy of an indenture of lease executed by and between the said Rio Grande Dam & Irrigation Company and its co-defendant, The Rio Grande Dam, Irrigation and Land Company, Limited, and the said exhibits when so filed be considered and taken as a part of the record considered by the court upon the hearing of said rule upon said injunction, and that said exhibits be considered as filed *nunc pro tunc* of date the 25th day of June, A. D. 1897.

GIDEON D. BANTZ,
Judge.

And be it further remembered that afterwards, to-wit: on the 31st day of July, A. D., 1897, there was entered of record in the said United States District Court, an order which said order is in words and figures as follows, to-wit:

In the District Court of the Third Judicial District of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States.

United States of America,	}
Complainant.	
No. 140. vs.	
Rio Grande Dam and Irrigation Company, et als.	
Defendants.	}

ORDER.

And now this cause coming on to be heard, the United States of America appearing by its attorney for the Territory of New Mexico, W. B. Childers, Esq., and with him appearing, by courtesy, T. A. Falvey and W. B. Brack, Esq., of El Paso, Texas, and the defendant, The Rio Grande Dam & Irrigation Company and The Rio Grande Irrigation and Land Company, Lim-

ited, by their solicitors, W. A. Hawkins, S. B. Newcomb and A. B. Fall, Esqrs., under the rule heretofore made upon the defendant, Rio Grande Dam and Irrigation Company, to show cause, if any it had, why the injunction, heretofore granted, restraining it from maintaining and erecting a dam in the Rio Grande river at a point called Elephant Butte, fully described in the original and amended bills, filed herein and in said order, should not be continued; and the said complainant, the United States of America, having filed an amended bill in said cause, making the Rio Grande Irrigation and Land Company, Limited, a party thereunder, and the said defendant, in answer to said amended bill, having filed a special plea in bar and having also answered said amended bill and also filed a motion to dissolve the injunction and to dismiss the original and amended bills so filed by complainant herein, and the complainant thereupon having filed its motion to set down defendants' pleas for argument as to their sufficiency as defense to said suit as a matter of law, and the court having heard the arguments of counsel and having heard read the affidavits, extracts from geological reports, agricultural reports, reports of engineers and of the Secretary of War, histories and other sources of information, and having had submitted to it, official map of the Territory of New Mexico and of the United States of America, showing the source, trend, course and mouth of the Rio Grande river in New Mexico and throughout the United States and being fully advised thereby, doth take judicial notice of the fact and doth thereby determine that the Rio Grande river is not navigable within the Territory of New Mexico, and doth find as a matter of law that said amended bill does not state a case entitling

the complainant to the relief asked for in the prayer of said amended bill and that the same is without equity and the complainant having further declined to amended said bill:

The court doth order, adjudged and decree, that the said injunction, heretofore issued, herein be dissolved and that said cause be, and the same hereby is dismissed, and that the defendants have and recover their reasonable costs herein to be taxed against complainant.

And upon the complainant, the United States, in said cause praying an appeal from the order of the court, dismissing said cause, it is ordered that said appeal be and the same hereby is granted as prayed.

GIDEON D. BANTZ,
Judge and Chancellor.

Done at Chambers, this the 30th day of July, A. D., 1897.

United States of America, Territory of New Mexico,
Third Judicial District Court.

I, W. B. Walton, clerk of the United States District Court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true and correct copy of all the record entries in cause number 140 on the docket of said court, wherein the United States of America is complainant and The Rio Grande Dam & Irrigation Company, et. al., are defendants, as the same appear of record in my office.

[SEAL.]

Witness my hand and the seal of
said court, at Silver City, New
Mexico, this twelfth day of
August, A. D., 1897.

W. B. WALTON,
Clerk.

In the District Court, Third Judicial District.

United States of America.

No. 140. vs.

The Rio Grande Dam & Irrigation Company, et al.

} Injunction.

SYLLABUS OF OPINION.

(1.) Under the treaties with Mexico each Republic reserves all right within its own territorial limits. This would have been so upon principles of international law without such reservation. States lying wholly within the United States belong exclusively to it, and the soil within the United States is not burdened with a servitude in favor of Mexico, in respect to any duty to so discharge the water as to promote or preserve the navigability of the Rio Grande.

(2.) It is not the capacity of a stream to float a log or a row boat which renders it a navigable river within the Acts of Congress (1890 and 1892) but whether, at regular periods of sufficient duration and in its regular condition, its capacity is such as to be susceptible of beneficial use as a public highway for commerce. The Rio Grande in New Mexico is not a navigable river.

(3.) The power to control and regulate the use of waters not navigable, exercised by states and territories in the arid west, was confirmed by Congress by the Act of 1866, and that power now resides wholly in such states and territories under the Act of 1877 and subsequently, therefore the diversion of such local waters is not a violation of any Act of Congress even though the navigable capacity at a distance below may become thereby impaired.

United States of America

No. 140. vs.

The Rio Grande Dam & Irrigation Company, et al.

} Injunction.

OPINION OF THE COURT.

The issues briefly stated are these:

The amended bill charges that the defendant is, (1) about to obstruct the Rio Grande, a navigable river, and, (2) obstruct the flow of waters and interfere with the navigable capacity of a river. That such obstructions would be in violation of the Acts of Congress of 1890 and 1892, and contrary to the treaty with Mexico.

A preliminary injunction was granted, and the defendant ordered to show cause why it should not be continued. The defendant filed its answer denying that the Rio Grande is a navigable river; and also filed special pleas justifying under right of way, for reservoir and canals secured under the Acts of 1891, and certain Territorial laws.

The issues arise on the motion to dissolve the injunction and upon the sufficiency of the special pleas.

It may be stated at the outset, that this is not a contest between private persons as to superior right by prior appropriation. When that question arises the courts will doubtless be entirely competent to deal with it.

The Rio Grande from El Paso to the Gulf of Mexico is the boundary line between Mexico and the United States, and under treaty between those Republics, the Rio Grande along such boundary is made free and common to the vessels and citizens of both countries. There is no guaranty by either Republic that the Rio Grande is or will continue to be navigable, but each party stipulated that it would not construct any work "below the intersection of the 31 degree, 47 min. 30 sec. parallel of latitude with the boundary line" which may impede or interrupt in whole or in part the exercise of the free

and common use of the river. Neither Mexico nor the United States surrendered any proprietary right to the adjacent soil or to any incident thereof. Indeed it is expressly stipulated that the treaty shall not "impair the territorial rights of either Republic within its established limits."

The legal effect would have been the same had the reserving clause been omitted, as under the proper rule of construction the free and unobstructed passage is ceded without prejudice to other territorial rights. The continued enjoyment of other proprietary rights must be presumed unless expressly renounced. Vattel Law Nations Sec. 273.

The territory of the United States includes the lakes, seas and rivers lying within its limits; hence rivers flowing through it, form part of its domain and cannot be considered as free to other countries any more than the adjacent lands.

An exception to this general rule has been sometimes claimed where the river flows from one state through the territory of another, in favor of the right of passage to and from the inland state for commercial and other peaceful purposes. While this exception has been sometimes contested (ex. gr. by Spain over the Mississippi, Great Britain over the St. Lawrence, Holland over the Scheldt) it is at best regarded as an imperfect right subservient to the convenience and safety of the state affected. Wheaton International Law, 188-205; Polson Law Nations, 30.

It therefore seems clear that there is no duty created by international law or by treaty, which requires that the waters collected along the Rio Grande and lying wholly within the United States shall be so discharged as to aid in the navigation of the Rio

Grande along the Mexican boundary; and the diversion of waters lying wholly within the United States, is not a violation of any treaty rights secured to Mexico. If it were otherwise, the secondary and dependent right of navigation, would absorb the superior and primary territorial rights of the United States over its own domain, and subject lands wholly within the limits of this Republic, to the burdens of a servitude not expressed in the treaty, or implied from any reasonable interpretation of its language.

This brings us to a consideration of the question, as to whether the Rio Grande is a navigable river in New Mexico, and at the point known as Elephant Butte, within the meaning of the Acts of Congress of 1890 and 1892.

Counsel on each side of this case, concede that the court takes judicial notice of what are navigable rivers; but for the enlightenment of the court in this matter, a great mass of documentary information has been submitted in the shape of maps, reports of exploring and surveying expeditions made under the War and Interior Departments of the Government, and also reports of officers, specially detailed to investigate the feasibility of utilizing the river for navigation, and its capabilities for reservoirs and irrigation.

It will be observed, that in the original bill it was not charged, that the Rio Grande is a navigable river above El Paso, but charged that the river is navigable below El Paso, and that defendants' proposed dam (125 miles above) will destroy the river as a stream, diminish the volume of water below, and materially affect its navigability. The amended bill charges that the river is navigable, up as far as Roma, a short distance above the gulf of Mexico, and is susceptible of

navigation and has been navigated from Roma, to a point 150 miles below El Paso, (Presidio del Norte) where the falls and rapids interrupt navigation, and that the river above the falls, is susceptible of navigation up to La Joya, above Elephant Butte; the bill closes this part with an allegation that the river is navigable and susceptible of being navigated as aforesaid, for carrying on commerce between the Territory of New Mexico, the State of Texas and the Republic of Mexico.

The course of the Rio Grande in New Mexico is through rocky cañons and sandy valleys; in the valleys it spreads out, shallow and between low banks; over fine, light, sandy soil of great depth; bars are continually forming, passing away and reforming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from four to fifty-two feet to the mile and the changes in its course are rapid, continual and often radical; the valley is scarred with low ravines made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise, and these were of timbers; one of these instances occurred in 1858 or 1859 when a raft was sent down from Canutillo to El Paso, a distance of 12 miles; and the other recently when some telegraph poles were floated from La Joya a "short distance." "The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand and in times of low water the stream divided into a number of minor channels; and apparently a large percentage of the water is lost in these great deposits of fine material" (12 Annual Rept. Geol. Sur. 204.)

"From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it." (10 Annual Rept. Geol. Sur. P. 99.) "From personal observation, I know that these seasons of flood and drouth (in Rio Grande) were of about the same character 30 years ago." (Maj. Anson Mills 10 U. S. Cav. Rept. Spec. Com. Sen. Vols. 3 and 4 P. 39). But what is of more importance, we have reports of officials upon the exploration of the river made under the direction of the Government for the special purpose of considering its navigability. From these it appears: "The stream is not now navigable, and it cannot be made so by open channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks and the small discharge, do not encourage the belief that such improvement would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. * * * In my judgment the stream is not worthy of improvement by the General Government." (Report of O. H. Ernst, major of engineers, to Secretary of War, 1889.) Again: "I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. * * * During the greater part of the year,

when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow canal with locks, the construction of which on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable." (Report of Gerald Bagnall, assistant engineer, to Secretary of War, 1889.)

The navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditures of vast sums of money, but upon its natural present conditions. In *Daniel Ball*, 10 Wallace, 557, the Supreme court says: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used in the ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water." In *the Montillo*, 20 Wallace, 431, the court says: "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact and becomes a public river or highway * * * the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." The court approves the language of Chief Justice Shaw in *21 Pickering* 344, who said: "In order to give it the character of a navigable stream it must be generally and commonly useful to some trade or agriculture." See also *Morrison vs. Coleman* (Ala.) 3 L. R. A. 334. Of course it need not be perennially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful

public purpose for commercial intercourse. While the capacity of a stream for floating log or even thin boards may be considered, yet the essential quality is that the capacity should be such as to subserve a useful public purpose. *Angell Water Courses* 335. In a recent case the Supreme court of Oregon says, per Thayer, C. J.: "Whether the creek in question is navigable or not for the purposes for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accomodate but a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation." And in the same case Lord J. said: "It must be susceptible of beneficial use to the public" be "capable of such floatage as is of practical utility and benefit to the public as a highway." And of the stream then in question he says: "It is not only not adapted to public use, but the public have made no attempt to use it for any purpose." *Haines vs. Hall (Oregon)* 3 L. R. A. 609. The Supreme court of Alabama says: "In determining the character of a stream, inquiry should be made as to the following points: Whether it be fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use, beneficially to the public." *Roads vs. Otis* 33, Ala. 578; *Peters vs. N. O. M. & C. R. Co.*, 56, Ala.

523. Indeed in the letter of inquiry by the Honorable Richard Olney, Secretary of State, in respect to the facts, as to the navigability of the Rio Grande, in interstate commerce among other essential qualities. he says: "It should be remembered, that a mere capacity to float a log or a boat, will not alone make a river navigable. The question is, whether the river can be used profitably for merchandise. I have been informed, that wood is sometimes brought down the river to Ciudad Juarez, in flat boats, and that logs are rafted or floated down from the timbered lands on the upper river, for commercial purposes." (Letter January 4, 1897.) The Secretary of State seems to have been misinformed, as to such use for commerce. This letter was addressed to Col. Anson Mills, at whose request, it appears that applications for right-of-way for irrigation, by the use of waters of the Rio Grande, and all its tributaries were suspended throughout New Mexico and Colorado. The answer of Col. Mills deals almost wholly with the river internationally, the river in its relation to interstate commerce is dismissed by him, with an instance of the floating of a raft of logs in 1859, from a point 18 miles above El Paso, and the qualifying remark "it would now hardly be practicable to do so." (Letter January 7, 1897.)

The fact that dams have been erected across the river at El Paso and other places, from the earliest times, and the fact that no use has been made of the stream for navigation or floatage, are facts which though they do not in themselves determine its susceptibility of navigation, are nevertheless entitled to great weight. They are facts clearly indicating the common judgment and knowledge of the people, who have had the longest and most intimate acquaintance with the capabilities of

the river, a knowledge founded on their own experience and that of their ancestors.

The Rio Grande is not a navigable river in New Mexico.

The next point is that, even though the Rio Grande be not navigable in New Mexico, still the contemplated obstruction will diminish the waters and thereby impair the navigability of the river at points several hundred miles below, near its mouth at the Gulf and that therefore it is an obstruction within the meaning of the Act of 1890. Counsel for defendant raise the point that the undisputed fact is, that a dam has been maintained for near two hundred years across the river at El Paso by which the waters of the Rio Grande are diverted into irrigating ditches in the City of El Paso and upon Mexican soil; and that in a proceeding in equity a chancellor cannot close his eyes to the fact that apparently some other purpose than navigation is the real object of this proceeding. If, however, the threatened act of the defendant be illegal, I cannot agree that the Government becomes powerless to resist it, merely because others are engaged in like enterprises.

We will therefore consider the question whether the contemplated obstruction at Elephant Butte will be an illegal interference with the navigability of the river several hundred miles below toward the gulf. The Act of 1890 (1 Sup. R. S., p. 803) prohibits the creation of obstructions "not affirmatively authorized by law" to the "navigable capacity" of any waters of the United States. Its terms are more comprehensive than the Act of July 13th, 1893, prohibiting the erections of dams, etc., etc., in any navigable river without the permission of the Secretary of War. It is con-

tended that under the Act of 1890 an obstruction, no matter where placed, is unlawful which diverts waters from flowing into a navigable river and thereby affects the navigable capacity of such a river. But a careful reading of the act will not, I think, sustain the contention. The Act applies only to obstructions to waters of which the United States has jurisdiction, and then only to the navigable capacity of such waters. The language is, "The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited." Waters which are not navigable are local and subject to local laws. The jurisdiction of Congress over waters arises from the power to regulate commerce between the states and foreign nations. *Veazie vs. Moor*, 14 How. 568. *Gould Waters*, 34. Unless therefore the stream is navigable and a means of communication between the states and foreign nations, Congress is utterly without jurisdiction over it, except in respect of its riparian rights arising from the ownership of the soil through which such waters run.

We might close the opinion at this point, but the important interests and questions involved in this cause perhaps require a more extended consideration.

The riparian rights of the United States were surrendered in 1866 (R. S. 2339); prior to that time it had become established that the common law doctrine of riparian rights was unfitted to the conditions in the far west, and new rules had grown up under local legislation and customs more nearly analogous to the civil law. Recognizing that the public domain could not be utilized for agriculture and mining purposes without the use of water applied by artificial means, and that

vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the rights of prior appropriation of waters by the Act above mentioned, where the same "are recognized and acknowledge by the local customs, laws and decisions of the courts." (Sec. 2339) The Supreme court of the United States in passing upon this Act observes, "it is evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition." *Atchison vs. Peterson*, 20 Wal. 507; *Basey vs. Gallagher*, 20 Wal. 671. And since 1870 patents for lands expressly except vested water rights.

Of course Congress may resume its control, but there can be no presumption of an intent to take them out of local control and resume regulative power from doubtful expression. Repeals by implication are not so favored. Congress could undoubtedly preserve navigable streams by legislating against the use of their confluence. But that power could not be exercised against those private rights which have become vested, unless under the power of eminent domain compensation be paid therefor.

Instead of an intention to resume such control Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region, and under local regulative control. Following in line with the Act of 1866 the Act of 1877 authorize the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. This act again distinctly recognized the validity

of the right of prior appropriation and also provided that "All surplus water over and above such actual appropriation and use together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights." This act was limited to States and Territories in the arid region (1 Sup. R. S. P. 137). Colorado was included in 1891 (1 Sup. R. S. 249-41). By the Act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation; it provided for the selection of sites for reservoirs for the storage and utilization of water for irrigation and the prevention of overflows, and that the lands designated for reservoirs, ditches or canals, and all lands susceptible for irrigation therefrom be reserved from sale or entry. (1 Sup. R. S. 698.) In 1890 the reservation from sale or entry of lands, except as to reservoir sites was repealed, reservoir sites remained segregated. (1 Sup. R. S. 791-792.) In the same year it was provided that patents for lands west of the 100th meridian should reserve the right of way for ditches and canals. (1 Sup. R. S. 792.) In 1892 public lands were opened to private location for the right of way to the extent of the ground occupied by the water of the reservoir, canals and laterals and fifty [feet] on the margin. In this Act it was provided that "the privilege herein granted shall not be construed to interfere with the control of the water for irrigation and other purposes under authority of the respective states or territories." (1 Sup. R. S. 946.) On the 26th day of February, 1897, Congress opened the reservoir

sites, reserved by the Government under the Act of 1891, to private location, and the local legislators were authorized to prescribe rules and regulations and fix water charges.

From these Acts two things are manifest, that (1) the use of the water for irrigation purposes was authorized; and (2) that the local laws should govern the use of that water for such purposes. In harmony with this use the Interior Department holds that in granting the right of way for reservoirs and canals it does not and cannot assume to determine or prescribe water rights, and that the flow and the use of the water is a matter exclusively under state or territorial control. Decision Interior Department, Vol. 18, p. 168.

"The region in which agriculture depends on irrigation includes about four-tenths of the entire area of the United States, not including Alaska." Report of Director of Geological Survey to Secretary of Interior, March 13, 1888. Throughout the vast tract classed as the arid region extending west from about the 100th parallel there is little or no use for water for navigation, but the cultivation of millions of acres of land is necessarily dependent upon the use of it. The authority to grant permission to divert waters for such purpose is not given to the Secretary of War, neither is it given to any one else. Yet if such water cannot be diverted, millions of acres now in cultivation must be turned back, a waste country, or the cultivation continued in violation of law, civil and criminal. These may be said to be considerations of policy with which the courts have nothing to do. If the law be clear this is undoubtedly true, and the courts must administer it; but in ascertaining what the law is we cannot refrain from examining the path we are invited to pursue. The

hardships and inconveniences which would result, not simply in an individual case, but from the establishment of a rule, is an argument against it. And, after all, there is much soundness in the observation of one of the foremost of American jurists, that the growth of the law is in truth legislative. "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean of course considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." Holmes' *Com. Law*, Lec. 1, p. 35. The *Genesee Chief* case is an illustration of this. There the court disregarded the arbitrary distinction in respect to the ebb and flow of the tide suitable to conditions in England, and which had been followed in the earlier cases in the United States, and it was held that the admiralty and maritime jurisdiction of the United States extended to the great lakes and rivers without limit as to the tide, and that this jurisdiction was not founded upon the clauses of the Constitution in respect to regulating commerce, but solely by virtue of its admiralty and maritime power. The English rule was appropriate enough, until the application of steam power to navigation opened the great rivers to commerce. (12th How. 450.)

Considering the discussion in Congress, the reports of committees, and the labors and reports of officials

in the Interior and War Departments, made under congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region, had become the recognized policy and the measure of the highest public importance and necessity. It would seem that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily, at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but such as it is, reservoir sites have been located, surveyed and established along the streams, navigable and non-navigable, under the immediate direction of government officials and by authority of Congress, and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

Ruins of extensive irrigation systems scattered all over New Mexico and Arizona of a pre-historic people show that conditions which have confronted the present age were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande Valley by acequias from the river is mentioned by the earliest of Spanish priests and explorers, and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this government was to declare that, "The laws heretofore in force concerning water courses * * * shall continue in force." Code proclaimed by Brigadier General Kerney, September 22nd, 1846.

One of the first acts of the local legislature (1852) after the organization of the Territory, provided that, "All rivers and streams of water in this Territory, formerly known as public ditches or acequias, are hereby established and declared to be public ditches or acequias." (Com. Laws Sec. 6.) In 1874, it was provided that "All of the inhabitants of the Territory of New Mexico, shall have the right to construct either private or common acequias, and to take the water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose lands said acequias have to pass, a just compensation for the land used." (C. L. Sec. 17) In 1887, an Act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake or spring, provided it does not interfere with prior appropriations. Session Acts 1887, Chap. 12. Other acts have passed since upon the subject, in regard to the acquisition of water rights. But this legislation is not peculiar to New Mexico; its general characteristics are common throughout the west, where the doctrine of prior appropriation prevails. This was the character of local legislation, which Congress recognized, confirmed and authorized by the various acts to which reference has been made. As an indication of the scarcity of the supply and of the great value attached to water, one of the early acts of the legislature prohibited the making of paths across the fields, as they were calculated to divert the flow of the water and injure acequias. The doctrine of prior appropriation, has been the settled law of this Territory by legislation, custom and judicial decision. Indeed it is no figure of speech to say that agriculture and mining life of the whole country

depends upon the use of the waters for irrigation, and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor, than those which have been acquired in the Rio Grande Valley in New Mexico.

Therefore the diversion of such local waters is not a violation of any Act of Congress even though the navigable capacity of the river at a distance below, may become thereby impaired.

In conclusion it is therefore held that the Rio Grande is not a navigable river above El Paso, and that the waters thereof are local waters under local control, by the authority of Congress, and that their interruption and diversion is not a violation of any law of the United States or any treaty. In this view of the case it appears that the bill as amended is without equity and the injunction heretofore granted should be dissolved. It will be unnecessary to decide whether the waters of a navigable river may be diverted as that issue does not arise in this case. As the bill is without equity other questions which have been raised need not be considered.

GIDEON D. BANTZ,
Judge and Chancellor.

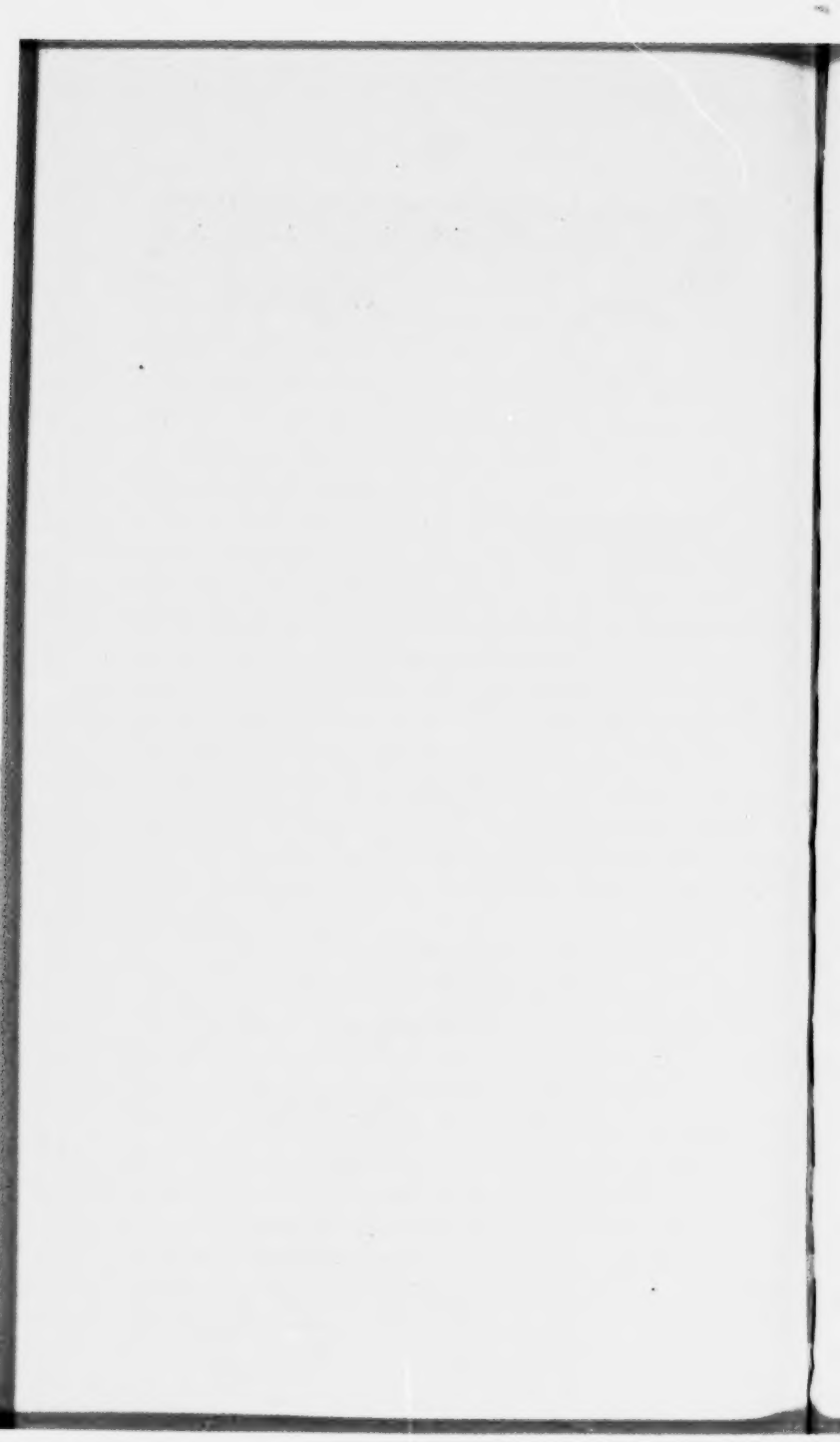
United States of America, Territory of New Mexico,
Third Judicial District Court.

I, W. B. Walton, clerk of the United States District Court of the Third Judicial District of the Territory of New Mexico, do hereby certify that the foregoing and attached files are all of the original papers filed in my office in cause numbered 140 on the docket of said court, wherein the United States of America is complainant, and The Rio Grande Dam & Irrigation Company, et al., are defendants.

Witness my hand and the seal of said court, at Silver City, New Mexico, this thirteenth day of August, A. D., 1897.

[SEAL.]

W. B. WALTON,
Clerk.



APPENDIX.

The State of Texas, }
County of Cameron. }

Before me, Emilio C. Forto, a notary public in and for said county and state, on this day appeared William Kelly, who, after being by me duly sworn, on oath, deposes and says:

My personal experience in steamboating on the Rio Grande, began in July 1865, when I was serving as depot quartermaster at Brazos Santiago, Texas, and had charge of transportation for supplying the forces of General Fred Steele (then commanding the Army of the Rio Grande) occupying the river between its mouth and Laredo. Since then I have been continuously engaged in steamboating on this river, either as manager or owner.

Since 1865 I have been an interested observer of the changes in the volume of water coming down the Rio Grande, as affecting its navigation, and having had from time to time in my employment captains, pilots, mates, engineers, and other boatmen who had served on the river in their several capacities during and since the Mexican war (1846-8), I became familiar with its history from that date.

My personal observation has shown me that from 1865 to about 1880 there was little or no change in the average depth of navigable water between Roma and the mouth of the river. Since 1880 the volume of water has steadily decreased and at present the river is not navigable above Brownsville, for boats drawing over

30 inches of water or having more than twenty-four feet beam, for more than four months of the year and the channel between Brownsville and the mouth is very little, if anything, better.

From 1865 to 1874 steamboats of 200 to 250 tons, drawing from five feet to five feet and six inches, ran from the mouth of the river to Brownsville all the year round. During the same period we ran boats drawing four feet to Rio Grande City, Camargo, Roma and Mier.

In 1874-5 the navigation between Brownsville and the mouth by steamboats was abandoned in consequence of the building of a narrow guage railroad from Brownsville to the Gulf, at Pt. Isabel (Brazos Santiago). From 1875 to date, I have kept boats running above Brownsville.

In 1880, we ceased to run above Rio Grande City, on account of shoaling water, and since that date no steamboat, except on a few occasions during freshets, has gone above that point. In 1885, I found that the river was permanently shoaling, and it was necessary to get a much smaller boat of lighter draft. The boat (the iron steamboat "Bessie" 100 tons) running to Rio Grande City at present, does not load to over 28 inches, and can only run to that point six or seven months in the year.

All steamboat men, and others, familiar with this river, with whom I have discussed the question, agree that chief cause of the decreasing water in the lower Rio Grande, is the fact, that the annual and semi-annual freshets from the headwaters of the stream no longer reach here in consequence of their being diverted for irrigation and other purposes. The confluent of the Rio Grande in Mexico and Texas, (ex

cept the Pecos) are small, and only supply water to the main stream spasmodically by freshets, seldom lasting over two or three days, and more frequently not so many hours. The steady supply came from the Rio Grande above El Paso, and that being cut off, or so seriously diminished, has not only destroyed the navigability of the lower river, but has turned tens of thousands of acres of heretofore cultivated and cultivable lands into arid wastes, for want of the flooding they used to receive from the headwaters twice every year.

The average rainfall at Brownsville and Rio Grande City (I have no data from points above) has not materially decreased in the last twenty years. The hospital records at Fort Brown show the mean for ten years, from 1871 to 1880, to have been 23.26 inches; from 1880 to 1890 to have been 24.32—the annual minimum during that period having been 17.19 inches in 1875, and the max. 30.14 in 1882. While we have had a period of draught for the four years previous to July, 1896, the shortage of rainfall has been during the spring and summer—the winter rains have been about normal. This shows that the decreasing volume of water in the lower Rio Grande is not due to local causes.

The freshets coming from the Rio Grande above El Paso, previous to 1880, kept the lower river in good boating order all year, and old boatmen would say of rises in the stream, "That is El Paso water," or "that is Pecos water," or "that is San Juan water," basing their judgment on the color of the water and character of the drift. For several years I have not heard anyone at Brownsville say, "that is El Paso water," meaning water coming from above El Paso.

It is quite clear to me that any further diminution of the supply coming from above El Paso, by dam or otherwise, will, in the course of a short time, render the lower Rio Grande unnavigable. I have no doubt that with the volume of water we had previous to 1880 the river could, with comparatively little expense (chiefly in removing the rocks that cause the rapids near Guerrero), be made navigable for boats drawing four feet of water as high up as Laredo. Above that point I have no personal knowledge.

(Signed)

WILLIAM KELLY.

Sworn to and subscribed before me, by William Kelly on this the 20th day of July, 1897.

(Signed)

EMILIO C. FORTO,

[SEAL]

Notary Public in and for
Cameron County, Texas.

[Copy.]

154 And afterwards, to wit, on August 23rd, 1897, there was filed in the office of the clerk of said supreme court an assignment of errors, which said assignment of errors is in the words and figures following, to wit:

UNITED STATES OF AMERICA, APPELLANT,	} No. 753.
<i>vs.</i>	
THE RIO GRANDE DAM AND IRRIGATION CO. ET AL., appellees.	

Assignment of errors.

Now comes the appellant in the above-entitled cause and assigns, as error committed by the court below, the following, that is to say:

1. The court erred in holding that appellant's original and amended bill of complaint contained no grounds for an injunction.

2. The court erred in failing to pass upon and hold defendants' pleas insufficient.

3. The court erred in dismissing complainant's bill and dissolving the temporary injunction.

WILLIAM B. CHILDERS,
U. S. Attorney for New Mexico.

155 And afterwards, to wit, on Tuesday, August 24th, A. D. 1897, at the said regular term of said supreme court, the following, among other proceedings, were had, to wit:

UNITED STATES OF AMERICA, APPELLANT,	} No. 753. Appeal
<i>vs.</i>	
THE RIO GRANDE DAM AND IRRIGATION COM- pany et al., appellees.	

This cause coming on to be heard upon the transcript of record, assignment of errors, and briefs of counsel on file, and the court hears argument by W. B. Childers, esq., for appellant, and A. B. Fall, W. A. Hawkins, and S. B. Newcomb, esqrs., for appellees, and the court, not being sufficiently advised in the premises, takes the same under advisement.

And afterwards, to wit, on Wednesday, August 25th, 1897, at the said regular term of said supreme court, the following, among other proceedings, were had, to wit:

UNITED STATES OF AMERICA, APPELLANT,	} No. 753. Appeal
<i>vs.</i>	
THE RIO GRANDE DAM AND IRRIGATION COM- pany et al.	

This cause having been argued and submitted to and taken
156 under advisement by the court at a former day of the present term, and the court, being now sufficiently advised in the premises, announces its decision by Chief Justice Smith, Associate Justices Collier, Hamilton, and Loughlin concurring, Associate Justice Banty not sitting, affirming the judgment of the court below, for reasons stated in open

court and that will appear more fully in the opinion to be filed herein. It is therefore ordered, adjudged, and decreed by the court that the judgment of the district court of the third judicial district in the Territory of New Mexico, whence this cause came into this court, be, and the same hereby is, affirmed, and in accordance with said judgment of said district court it is ordered, adjudged, and decreed that the said injunction, heretofore issued herein, be dissolved and that said cause be, and the same hereby is, dismissed and that the said defendants do have and recover their reasonable costs herein, as well in the court below as in this court, to be taxed, for which let execution issue; and thereupon the appellant herein, by her attorney, William B. Childers, esq., prays an appeal to the Supreme Court of the United States from the judgment and decision of this court. It is therefore ordered that the appellant herein be, and hereby is, allowed an appeal to the Supreme Court of the United States from this judgment and decision.

TERRITORY OF NEW MEXICO,

Supreme Court, ss:

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a full, true, and perfect transcript of the record, assignments of error, and all proceedings had in a certain cause lately pending in said supreme court, wherein the United States of America was appellant and the Rio Grande Dam & Irrigation Company et al. were appellees, as the same remains on file and of record in my office; and I further certify that the three maps hereto attached and marked Exhibits E, D, & C, respectively, are the original maps filed in my office as exhibits in said cause, and directed by the United States attorney for the Territory of New Mexico to be forwarded with this transcript to the Attorney-General of the United States, to be used on the hearing of said cause in the Supreme Court of the United States.

Witness my hand and the seal of said supreme court this 1st day of November, A. D. 1897.

GEO. L. WYLLYS, *Clerk.*

158 THE UNITED STATES OF AMERICA.

To the Rio Grande Dam and Irrigation Company and the Rio Grande Irrigation and Land Company, Limited, greeting:

Whereas the United States of America has lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of the Territory of New Mexico in favor of you, the said The Rio Grande Dam & Irrigation Company and the Rio Grande Irrigation & Land Company, Limited, which said decree so appealed from was rendered on the 25th day of August, 1897, in a certain cause then pending in said supreme court of said Territory wherein the United States of America was plaintiff and appellant, and you, the said Rio Grande Dam & Irrigation Company and the said Rio Grande Irrigation & Land Company, Limited, were defendants and appellees:

You are therefore cited to be and appear before the said Supreme Court of the United States, at the city of Washington, on the twenty-fourth day of January, A. D. 1898, to do and receive what may appertain to justice to be done in the premises.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 23rd day of November, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the 121st.

THOMAS SMITH,

Chief Justice of the Supreme Court of the Territory of New Mexico.

Service of above citation acknowledged by delivery of a copy thereof upon this the 26th day of November, A. D. 1897, and the appellees hereby agree to enter their appearance in said cause.

S. B. NEWCOMB,

Counsel for Appellees.

(Indorsed:) Filed in my office this Nov. 27, 1897. Geo. L. Wyllys, clerk.

159 In the Supreme Court of the United States of America.

THE UNITED STATES OF AMERICA, APPELLANT,	}
<i>vs.</i>	
THE RIO GRANDE DAM & IRRIGATION COM- pany and the Rio Grande Irrigation & Land Company, Limited, appellees.	

Stipulation.

It is hereby stipulated and agreed by and between the appellant and the appellees in the above-entitled cause, that no opinion has yet been rendered and filed in the supreme court of the Territory of New Mexico in said cause; that a decree affirming the decree of the district court was rendered in the supreme court, the court announcing its intention to file an opinion thereafter, but which said opinion has not as yet been filed;

And it is further stipulated, that the record in said cause may be considered as showing this fact, that any statement in the record in conflict therewith is a mistake made by inadvertence.

It is further stipulated, that if any opinion may be filed by the supreme court of the Territory of New Mexico, that the clerk may certify a copy of the same, and it may be filed and be taken as a part of the record in this case.

Counsel for Appellants.

S. B. NEWCOMB,

Counsel for Appellees.

(Indorsed:) Filed in my office this Nov. 27, 1897. Geo. L. Wyllys, clerk.

160 TERRITORY OF NEW MEXICO,

In the Supreme Court:

I, George L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a full, true, and perfect transcript of the record, assignments of error, and all

proceedings had in a certain cause lately pending in said supreme court, wherein the United States of America was appellant and the Rio Grande Dam and Irrigation Company et al. were appellees, as the same remains on file and of record in my office; and I further certify that the three maps hereto attached and marked Exhibits E, D, and C, respectively, are the original maps filed in my office as exhibits in said cause and directed by the United States attorney for the Territory of New Mexico to be forwarded with this transcript to the Attorney-General of the United States to be used on the hearing of said cause in the Supreme Court of the United States. And I do further certify that up to the time of the dating of this certificate no opinion by the court has yet been filed in said cause in the supreme court of the Territory of New Mexico; and I do further certify that the order granting an appeal therein was taken in open court at an adjourned session of the July term of the said supreme court; and I further certify that since the taking of said appeal assignments of error were signed and issued and duly returned, together with a stipulation in said cause, which is also appended, next preceding this certificate, as a part of the record therein.

Witness my hand and the seal of said supreme court this 11th day of of December, 1897.

[SEAL.]

GEO. L. WYLLYS, *Clerk.*

(Indorsement on cover:) Case No. 16756. New Mexico Territory, supreme court. Term No., 543. The United States, appellant, vs. The Rio Grande Dam and Irrigation Company and The Rio Grande Irrigation & Land Company, Limited. Filed December 21st, 1897. Office Supreme Court of U. S. Received December 21, 1897.

SUPREME COURT OF NEW MEXICO.

JULY TERM, 1897.

No. 753.

THE UNITED STATES OF AMERICA, APPELLANT,	} Appeal from the third judicial dis- trict court.
vs.	
THE RIO GRANDE DAM AND IRRIGATION COM- pany et al., appellee.	

This is a suit in equity brought by the United States to restrain the Rio Grande Dam & Irrigation Company from constructing or maintaining a dam across the Rio Grande River, in the Territory of New Mexico. The structure especially aimed at is a dam projected and about to be built by the defendant company at a point called Elephant Butte, the object of which is to take water from the river, and store it in reservoirs, for the purpose of irrigation. The ground upon which the claim of the Government is predicated is that the Rio Grande is a navigable river, and that the proposed dam will obstruct the navigation of the river, the flow of waters therein, and interfere with its navigable capacity, and that such obstructions would be contrary to the treaty with Mexico, and in violation of the acts of Congress.

2 A preliminary injunction was granted and defendant ordered to show cause why it should not be continued. The defendant answered, denying that the Rio Grande is a navigable river, and also filed pleas justifying under its right of way for canals and reservoirs secured under the act of Congress of 1891 and certain Territorial laws. Upon the hearing, the court below held that upon the facts presented by affidavit, as well as other facts of which it took judicial notice, the Rio Grande is not a navigable stream within the Territory of New Mexico, and that the bill does not state a case entitling it to the relief prayed; and upon the complainant's declining to amend its bill further the court dissolved the injunction and dismissed the bill. From that judgment the United States appealed to this court.

The right of the United States to prevent the construction of the irrigation works in question is sought to be deduced chiefly from two acts of Congress, viz:

1. The act of September 19, 1890, sec. 10, which prohibits "the creation of any obstruction, not affirmatively authorized by law, to the

navigable capacity of any waters in respect to which the United States has jurisdiction."

2. The act of July 13, 1892, sec. 3, which declares that it shall not be lawful "to build any * * * dam, wier, * * * or structure of any kind * * * in any navigable waters of the United States * * * without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said water."

3 Some allusion has been made to the treaty of Guadalupe Hidalgo of 1848, between the United States and Mexico, as containing stipulations which would be violated by permitting the contemplated construction to proceed. The only provision of that treaty bearing upon this subject simply provides in article 7, that the part of the Rio Grande lying below the southern boundary of New Mexico is divided in the middle between the two Republics, and that the navigation below said boundary "shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right." Manifestly this applied only to that portion of the river below the boundary of New Mexico, for the same article contains the further qualifying clause that—

"The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits."

Furthermore, the treaty of 1854, known as the Gadsden treaty, contains an express provision that the stipulations and restrictions of the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Grande "below the intersection of the 31 degree, 57 min., 30 sec., parallel of latitude with the boundary line established by that treaty."

There is no undertaking by either of the parties to these treaties that the Rio Grande is, or shall continue to be, navigable. All that either agreed to in this connection was that it would not construct, below the point of intersection of the above-mentioned parallel of latitude, which is about that of El Paso, any work which would interfere with the common use of the river. No obligation devolved upon the United States to conserve the waters of the river above that point for the purpose of facilitating navigation below it.

4 We think the whole question turns upon the applicability of the acts of Congress above mentioned. By their express terms these acts deal only with navigable waters. Unless the Rio Grande is a navigable stream, and its "navigation," or "navigable capacity" will be obstructed by the proposed dam, these statutes do not apply to the case, and can not be invoked to enable the Government to stop the progress of the work by injunction.

It is alleged in the original bill that the Rio Grande, from and including the site of the proposed dam, has been used to float logs for commercial and business purposes and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas and the Republic of Mexico. In the amended bill it is alleged that the said river is susceptible of navigation for commercial purposes

up to La Joya, in the Territory of New Mexico, about one hundred miles above Elephant Butte. In both, the river is alleged to be navigable at certain points below El Paso.

It is conceded that the navigability of waters is a matter of which courts take judicial notice. The record contains a large mass of information, in the form of maps, reports of exploring and surveying expeditions made under the direction of the War and Interior Departments, and also reports of officers specially detailed to investigate the feasibility of rendering the river commercially navigable by improvements, and also its capability of supplying reservoirs for irrigation.

From these and other data the following facts, as stated in the opinion of the court below, are well established:

5 The course of the Rio Grande in New Mexico is through rocky canons and sandy valleys; in the valleys it spreads out shallow and between low banks; over fine, light, sandy soil of great depth; bars are continually forming, passing away, and re-forming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from four to fifty-two feet to the mile, and the changes in its course are rapid, continual, and often radical; the valley is scarred with low ravines, made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise, and these were of timbers; one of these instances occurred in 1858 or 1859, when a raft was sent down from Canutillo to El Paso, a distance of 12 miles; and the other recently, when some telegraph poles were floated from La Joya, a "short distance." "The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand, and in times of low water the stream divided into a number of minor channels, and apparently a large percentage of the water is lost in these great deposits of fine material." (12 Annual Rept. Geol. Sur., 204.) "From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it." (10 Annual Rept. Geol. Sur., p. 99.) "From personal observation, I know that these seasons of flood and drouth (in the Rio Grande) were of about the same character 30 years ago." (Maj. Anson Mills, 10 U. S. Cav. Rept. Spec. Com. Sen., vols. 3 and 4, p. 39.) But what is of more importance, we have reports of officials upon the exploration of the river, made under the direction of the Government, for the special purpose of considering its navigability. From these it appears:

6 "The stream is not now navigable, and it cannot be made so by open-channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks, and the small discharge do not encourage the belief that such improvement would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. * * *

In my judgment the stream is not worthy of improvement by the General Government." (Report of O. H. Ernst, major of Engineers, to Secretary of War, 1889.) Again: "I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. * * * During the greatest part of the year, when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow canal, with locks, the construction of which on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable." (Report of Gerald Bagnall, assistant engineer, to Secretary of War, 1889.)

The navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditures of vast sums of money, but upon its natural present conditions. In the *Daniel Ball* (10 Wallace, 557) the Supreme Court says: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used, in the ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." In the

7 *Montello* (20 Wallace, 431) the court says: "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact and becomes a public river or highway. * * * The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." The court approves the language of Chief Justice Shaw, in *21 Pickering*, 344, who said: "In order to give it the character of a navigable stream it must be generally and commonly useful to some trade or agriculture." See also *Morrison vs. Coleman* (Ala.) (3 L. R. A., 334). Of course it need not be perennially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. While the capacity of a stream for floating logs or even thin boards may be considered, yet the essential quality is that the capacity should be such as to subserve a useful public purpose. (*Angell Water Courses*, 335.) In a recent case the supreme court of Oregon says, per Thayer, C. J.: "Whether the creek in question is navigable or not for the purposes for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate but a few persons it can not be considered a navigable stream for any purpose. It must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation." And in the same case Lord, J., said: "It must be susceptible of beneficial use to the public," be "capable of such floatage as is of practical utility and benefit to the public as a highway." And of the stream then in question he says: "It is not only not adapted to public use, but the public have made no attempt to use it for any purpose." (*Haines vs. Hall* (Oregon), 3 L. R. A., 609.) The supreme

8 court of Alabama says: "In determining the character of a stream inquiry should be made as to the following points: Whether it be

fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public. (Roads vs. Otis, 33 Ala., 578; Peters vs. N. O., M. & C. R. Co., 56 Ala., 523.) Indeed, in the letter of inquiry by the Honorable Richard Olney, Secretary of State, in respect to the facts as to the navigability of the Rio Grande, in interstate commerce among other essential qualities, he says: "It should be remembered that a mere capacity to float a log or a boat will not alone make a river navigable. The question is, whether the river can be used profitably for merchandise. I have been informed that wood is sometimes brought down the river to Ciudad Juarez in flat-boats and that logs are rafted or floated down from the timbered lands on the upper river for commercial purposes." (Letter January 4, 1897). The Secretary of State seems to have been misinformed as to such use for commerce. This letter was addressed to Col. Anson Mills, at whose request it appears that applications for right of way for irrigation by the use of waters of the Rio Grande and all its tributaries were suspended throughout New Mexico and Colorado. The answer of Col. Mills deals almost wholly with the river internationally; the river in its relation to interstate commerce is dismissed by him with the instance of the floating of a raft of logs in 1859 from a point 18 miles above El Paso, and the qualifying remark "it would now hardly be practicable to do so." (Letter January 7th, 1897.)

9 It is perfectly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse in any manner whatever, and that it is not now capable of being so used. On the other hand it has been, from the earliest times of which we have any knowledge, used as a source of water for irrigation. Its valley has always been the center of population in New Mexico. It was the first portion of this region to be occupied and settled by civilized men, and the population of this valley has always been, and is now, absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops. Dams have been erected and maintained at El Paso for nearly 200 years, by which the river has been obstructed and its waters diverted for irrigation to both sides of the Rio Grande. But never until the present time, so far as we can ascertain, has any question been raised by anyone as to interference with any use of the river for purposes of navigation. Indeed, it appears from the affidavits and reports presented in support of the bill in this case that the objection now raised to the construction of the defendant's dam grows out of the proposed construction of an international dam and reservoir at El Paso, to be constructed under the auspices of the two Governments. The investigation of the feasibility of such an international dam and reservoir is being made on behalf of the United States under the authority of Congress, thus evincing the deliberate intention of the Government, by its political department, to take measures, not for the purpose of improving the navigability of this river, but of permanently obstructing it at a point far below the site of defendant's works, and thus to devote the stream to irrigation instead of navigation. One of the affi-

10 davits in support of the bill is made by the commissioner of the United States engaged upon this investigation, the object of which he states to be "the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on its banks or tributaries having equitable interests therein." And he also states in one of his reports that "the probable flow of water in the river here (El Paso) is likely to be ample for the supply of the proposed international reservoir, * * * * but that the flow will not be sufficient to supply the proposed international reservoir here and allow for the supply for the proposed reservoir of the Rio Grande Irrigation Company, at Elephant Butte, in New Mexico, or any other similar reservoirs in New Mexico, and but one of these schemes can be successfully carried out."

That is to say, in order to render feasible the storage of water for irrigation at El Paso, it is essential to prohibit all similar structures along the river at points above.

From these extracts it seems clearly apparent that the work at El Paso, to which the United States has committed itself, tentatively, at least, is not designed to preserve or improve the navigable capacity of the river, but to facilitate the distribution of the waters which may be gathered by obstructing the stream for the benefit of riparian occupants, and that the object of this proceeding is not to secure a public benefit from the navigation of the Rio Grande, but rather, under the guise of a question of navigability of the stream, to obtain an adjudication of the interests of rival irrigation schemes, in aid of one locality against another.

Manifestly neither the acts of Congress cited nor the provisions of the treaty have any application to questions of this kind, and they can not be invoked to settle conflicting local interests whose determination must necessarily depend upon entirely different considerations.

11 The Rio Grande, as we have said, flows through a region dependent upon irrigation. It is a part of what is known as the arid region of this country, embracing, according to the report of the Director of the Geological Survey, about four-tenths of the entire area of the United States, in which the rainfall is not sufficient for the production of crops. Here the paramount interest is not the navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads, with which these comparatively insignificant streams could not compete. But on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and if such use were denied them, it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity. These conditions have been distinctly recognized in the legislation of Congress, for while it has refrained from any attempt to render streams like the Rio Grande navigable by artificial works, and has not in any way treated them as navigable waters, Congress has, by the reservation or survey of reservoir

sites along its valley, and the appropriation of large sums of money for the prosecution of investigations and surveys to this end, clearly indicated its purpose to treat these waters as suitable only for irrigation, and to consider such a use of them as the one of commanding importance.

12 The riparian rights of the United States were surrendered in 1866 (R. S., 2339); prior to that time it had become established that the common-law doctrine of riparian rights was unfitted to the conditions in the far West, and new rules had grown up under local legislation and customs more nearly analogous to the civil law. Recognizing that the public domain could not be utilized for agricultural and mining purposes without the use of water applied by artificial means, and that vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the rights of prior appropriation of waters, by the act above mentioned, where the same "are recognized and acknowledged by the local customs, laws, and decisions of the courts." (Sec. 2339.) The Supreme Court of the United States, in passing upon this act, observes, "It is evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition." (*Atchison vs. Peterson*, 20 Wal., 507; *Basey vs. Gallagher*, 20 Wal., 671.) And since 1870 patents for lands expressly except vested water rights.

Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region under local regulative control. Following in line with the act of 1866 the act of 1877 authorized the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. This act again distinctly recognized the validity of the right of prior appropriation, and also provided that "All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of

13 water supply upon the public lands and not navigable shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." This act was limited to States and Territories in the arid region. (1 Supp. R. S., p. 137.) Colorado was included in 1891. (1 Supp. R. S., pp. 249-247.) By the act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation; it provided for the selection of sites for reservoirs for the storage and utilization of water for irrigation and the prevention of overflows, and that the lands designated for reservoirs, ditches, or canals, and all lands susceptible for irrigation therefrom be reserved from sale or entry. (1 Supp. R. S., 698.) In 1890 the reservation from sale or entry of lands, except as to reservoir sites, was repealed, reservoir sites remained segregated. (1 Supp. R. S., 791-792.) In the same year it was provided that patents for lands west of the 100th meridian should reserve the right of way for ditches and canals. (1 Supp. R. S., 792.) In 1892 public lands were opened to private location for the right of way to the extent of the ground occupied by the water of the reservoir, canals, and laterals and fifty (feet) on the margin. In this act it was provided that "the privilege herein granted shall not be construed

to interfere with the control of the water for irrigation and other purposes under authority of the respective States or Territories." (1 Supp. R. S., 946.) On the 26th day of February, 1897, Congress opened the reservoir sites, reserved by the Government under the act of 1891, to private location, and the local legislators were authorized to prescribe rules and regulations and fix water charges. (Decision Interior Department, Vol. 18, p. 168.)

Considering the discussions in Congress, the reports of committees, and the labors and reports of officials in the Interior and War
14 Departments, made under Congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region, had become the recognized policy and the measure of the highest public importance and necessity. It would seem that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily, at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but such as it is, reservoir sites have been located, surveyed, and established along the streams, navigable and nonnavigable, under the immediate direction of Government officials and by authority of Congress, and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

Ruins of extensive irrigation systems scattered all over New Mexico and Arizona of a prehistoric people show that conditions which have confronted the present age were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande Valley by acequias from the river is mentioned by the earliest of Spanish priests and explorers, and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this Government was to declare that, "The laws heretofore in force concerning water courses * * *

shall continue in force." Code proclaimed by Brigadier-General Kerner, September 22nd, 1846. One of the first acts of the local
15 legislature (1852) after the organization of the Territory provided that, "All rivers and streams of water in this Territory, formerly known as public ditches or acequias, are hereby established and declared to be public ditches or acequias." (Com. Laws, sec. 6.) In 1874 it was provided that, "All of the inhabitants of the Territory of New Mexico shall have the right to construct either private or common acequias, and to take the water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose lands said acequias have to pass a just compensation for the land used." (C. L., sec. 17.) In 1887 an act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream; lake, or spring, provided it does not interfere with prior appropriations. (Session Acts, 1887, chap. 12.) Other acts have been passed since upon the subject in regard to the acquisition of water rights. But this legislation is not peculiar to New Mexico; its general characteristics are common throughout the West, where the doctrine of prior appropriation prevails.

This was the character of local legislation which Congress recognized, confirmed, and authorized by the various acts to which reference has been made. The doctrine of prior appropriation has been the settled law of this Territory by legislation, custom, and judicial decision. Indeed, it is no figure of speech to say that agriculture and mining life of the whole country depends upon the use of the waters for irrigation; and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio Grande Valley in New Mexico.

16 It is contended that because the Rio Grande is capable of navigation to a limited extent several hundred miles below the point of the proposed dam its construction will, by arresting the flow of water in the stream, interfere with its navigable capacity and that it is therefore prohibited by the act of 1890. From the foregoing discussion of the legislation of Congress and the conditions prevailing in the region under consideration it would seem to follow that if there were a conflict between the interests of navigation and agriculture in relation to a stream like the Rio Grande that of the latter would prevail. Certainly it should be held to be under the protection of the courts against any doubtful interpretation or application of a penal statute. If the waters of the Rio Grande are not navigable in New Mexico, which we hold to be the case, then they can not be said to be waters in respect of which the United States has jurisdiction. And certainly in the absence of some express declaration to that effect it can not be supposed that Congress intended to strike down and destroy the most important resource of this vast region in order to promote the insignificant and questionable benefit of the navigation of the Rio Grande for a short distance above its mouth. For the construction contended for does not limit the prohibition of the act of Congress to the works proposed by the defendant. It applies to the maintenance as well as the original creation of obstructions. If defendant's dam at a point where the river is not navigable is an obstruction to the navigable capacity of the river several hundred miles below, the same must be said of every dam and irrigation ditch which diverts water from the river or any of its confluent to their primary sources. If upon this ground it is competent for the United States to prohibit the erection of defendant's dam it is equally competent for it to

17 compel the removal of every dam and headgate heretofore constructed in the Rio Grande and its tributaries and prohibit the use of their waters for irrigation throughout this entire valley. It is true that courts must administer the law as they find it, and if it is clear and free from doubt the consequences, however disastrous, cannot be considered as affording grounds for its non-enforcement. But in a case like this, where it is sought by intendment to give to a statute a meaning not apparent on its face, it is the duty of the courts to give full weight to these considerations in determining what was the intention of Congress. And in view of the condition and history of the region which would be affected the unimportance of the Rio Grande as a waterway for commercial intercourse at any point, its non-navigability at the place of the proposed construction and for hundreds of miles below, and the evident purpose of Congress by its legislation to promote irrigation throughout this portion of the country, even to the extent of further obstruction of

this very stream, it would in our opinion be unreasonable to hold that legislation which has a definite and well-understood purpose in furtherance of the public interest in those portions of the country to whose conditions it is applicable was intended to operate to the detriment of the public interests in regions to whose conditions it is not applicable and where its enforcement would be destructive of the very interests which the legislation of Congress has otherwise undertaken to promote.

We therefore hold that the work sought to be enjoined in this action is not in violation of any law of the United States, or any treaty, and that the judgment of the district court dissolving the injunction and dismissing the bill should be affirmed, and it is so ordered.

THOMAS SMITH,
Chief Justice.

I concur in the conclusion reached.

H. B. HAMILTON, A. J.
N. B. LAUGHLIN, A. J.

18 In the supreme court of the Territory of New Mexico.

I, Geo. L. Wyllys, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the above and foregoing is a true copy of the opinion filed in my office in the cause lately pending in said court entitled The United States of America, appellant, vs. The Rio Grande Dam and Immigration Company et al., appellees, as the same appears on file and remains of record in my office, and which said opinion was filed on Jan'y 5th, A. D. 1898.

Witness my hand and the seal of the supreme court of the Territory of New Mexico this 5th day of January, A. D. 1898.

[SEAL.]

GEO. L. WYLLYS, *Clerk.*

19 (Indorsed:) No. 753. Supreme court of New Mexico. The United States of America, appellant, vs. The Rio Grande Dam & Irrigation Co. et al., appellees. Appeal from the 3rd judicial district. Opinion. Filed in my office this Jan'y 5th, 1898. Geo. L. Wyllys, clerk.

20 (Indorsed on cover:) Case No. 16756. Supreme Court U. S., October term, 1897. Term No. 543. The United States, app't, vs. The Rio Grande Dam & Irrigation Co. et al. Certified copy of opinion of sup. court of New Mexico. Filed January 17, 1898.

U. S. No. 273.
Motion papers.

DEC 28 1897
JAMES H. MCKENNEY,
CLERK

Filed Dec. 28, 1897.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

UNITED STATES, APPELLANT,	} No. 542.
<small>v.</small>	
THE RIO GRANDE DAM AND IRRIGATION Co. et al., appellees.	

MOTION TO ADVANCE.

IN THE SUPREME COURT OF THE UNITED STATES

Writ of Habeas Corpus

The Hon. Chief Justice of the United States

Washington, D. C.

That your petitioner, [Name], is a citizen of the State of [State], and that he is now confined in the State Prison of [State], under a sentence of [Term], for the crime of [Crime].

The record in this case shows that your petitioner was convicted of the crime of [Crime] on [Date], and that he was sentenced to [Term] on [Date]. Your petitioner claims that his conviction and sentence are void, and that he is entitled to his freedom. Your petitioner claims that the trial was unfair, and that the evidence was insufficient to support the conviction. Your petitioner claims that the sentence is excessive, and that he is entitled to a new trial.

In the Supreme Court of the United States.

OCTOBER TERM, 1897.

UNITED STATES, APPELLANT, ¹	}	No. 543.
^{v.} THE RIO GRANDE DAM AND IRRIGATION Co. <i>et al.</i> , appellees.		

MOTION TO ADVANCE.

Now comes the appellant, by the Solicitor-General, and moves the court to advance said cause on the docket and set it for hearing at the earliest practicable date convenient to the court.

STATEMENT.

The record discloses the following facts:

The defendant company, The Rio Grande Dam and Irrigation Company, was duly incorporated under the laws of the Territory of New Mexico for the avowed purpose of constructing a reservoir and ditches for irrigation purposes at or near Elephant Butte, on the Rio Grande River, a point about 125 miles north of El Paso, Tex.; and in pursuance of this project it was the alleged purpose of said company to dam the said river at the last-named point. To prevent the building of such dam,

on or about the 24th day of May, 1897, the United States filed its bill in the district court of the third judicial district of the Territory of New Mexico, setting forth the alleged intention of the defendant to construct the dam, and that if constructed it would be a violation of section 10 of the act of Congress approved September 19, 1890 (26 Stat., 454), and of section 3 of the act of Congress approved July 13, 1892 (27 Stat., 110), and thereupon prayed for a writ of injunction restraining said company from constructing or commencing to construct such proposed dam. Upon filing said bill, the court issued a temporary writ of injunction, as prayed, and fixed a day for hearing.

Subsequently, and before any hearing was had, the complainant filed an amended bill alleging, among other things, that said Rio Grande River was navigable and had been navigated by steamboats for 350 miles from its mouth, and was susceptible of navigation up to La Joya, in the Territory of New Mexico, about 150 miles above Elephant Butte; and that the river, from some rapids located about 150 miles below El Paso to said town of La Joya, "has at different times been used for the purposes of floating and transporting rafts, logs, and poles, and that said portion of said stream is susceptible of being used and navigated for commercial purposes." The amended complaint also alleges, in substance, that the impounding of the waters at Elephant Butte, as contemplated by the defendants, would so deplete the flow of the water through the channel of said river "as to seriously obstruct the navigable capacity of the same

throughout its entire course from said point at Elephant Butte to its mouth." It also sets out the provision in the treaty between the United States and the Republic of Mexico (known as the treaty of Guadeloupe Hidalgo), declaring that the Rio Grande, from the southern boundary of the Territory of New Mexico to its mouth, shall be free and common to the vessels and citizens of both countries, and that neither country shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of said right of free navigation, "and that neither party of said treaty has consented or authorized the construction of said dam."

Issue was joined on this amended bill and the case was tried before the district judge. On the 30th day of July last the court decreed a dissolution of the injunction and dismissed the bill of complaint.

From this decree the complainant appealed to the supreme court of the Territory, which court affirmed the decree of the district court, and the complainant appealed to this court.

It further appears in the record from the sworn statement of the secretary of said defendants that previous to the commencement of these proceedings the defendants had let contracts for the construction of a large portion of the work necessary to carry out the contemplated scheme of building irrigation works at Elephant Butte for the purpose of furnishing water to farmers and others at and below said point; that the work of construction had so far progressed that the New Mexico company had expended therefor the sum of about \$90,000, and the whole

expenditure of the defendants for such actual construction and for surveys, salaries, etc., aggregated about \$150,000, and that it would not be possible to preserve for any great length of time the results of the work already done in the construction of ditches, pipe lines, etc.

In view of these facts it would seem but just to all the parties in interest that this case should be advanced and speedily heard. If the waters of the Rio Grande River are navigable at Elephant Butte, or if a dam at that point would be obnoxious to the statutes prohibiting obstructions in navigable waters or in violation of the treaty obligations of the United States, then the matter should be speedily determined; and if, on the contrary, the defendants are entitled to proceed with their enterprise, it would be an unwarranted hardship to delay the final decision so far as to effect the destruction of the work already accomplished.

Opposing counsel concur in this motion.

JOHN K. RICHARDS,
Solicitor-General.

○

No. 215.

JULY 13 1898
JAMES H. HAKENNEY
CLERK

Filed in Case No. (215) for

Filed Oct. 13, 1898.

In the Supreme Court of the United States.

October Term, 1898.

THE UNITED STATES, APPELLANT,

vs.
THE RIO GRANDE DAM AND IRRIGATION Company and the Rio Grande Irrigation and Land Company, Limited.

No. 215.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES, APPELLANT, <i>v.</i> THE RIO GRANDE DAM AND IRRIGATION Company and the Rio Grande Irrigation and Land Company, Limited.	} No. 215.
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BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal from the final decree of the supreme court of New Mexico adjudging the bill of complaint to be without equity, and dissolving the preliminary injunction which was granted at the time of filing the bill.

On the 24th of May, 1897, the United States, by its Attorney-General, filed its bill of complaint in the district court of the third judicial district of the Territory of New Mexico against the Rio Grande Dam and Irrigation Company, a corporation organized under the laws of New Mexico, praying that the defendant might be

restrained from beginning, building, creating, constructing, or maintaining any obstruction to the navigability of the Rio Grande River in the Territory of New Mexico by means of a dam, breakwater, or other obstruction. The bill set forth that the Rio Grande Dam and Irrigation Company had for the objects of its incorporation the construction and maintenance of dams and reservoirs, and canals, ditches, and pipe lines to the extent of from 50 to 5,000 miles in the Territory of New Mexico, and for the purpose of supplying water to be accumulated in practically illimitable quantity in said dams and reservoirs; that it was the object and purpose of said defendant company to construct and build dams across the Rio Grande River at certain points in New Mexico as might be necessary to carry out the objects and purposes of said incorporation, and particularly that the defendant was about to commence and create an unlawful obstruction in said river by constructing a dam in and across the river at a point called Elephant Butte, in the Territory of New Mexico, and in the third judicial district thereof, the same being 125 miles north and slightly west of the city of El Paso, in the State of Texas, for the purpose of storing water in large quantities to carry out the purposes of the said incorporation.

The bill alleged that the Rio Grande River, from and including the site of the proposed dam, had been used to float logs for commercial and business purposes, and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas and the Republic of New Mexico; that the Rio Grande River is a navigable stream, and used as such in

interstate commerce from the mouth of the Conchos River, in the Republic of Mexico, to the city of El Paso, a distance of 200 miles, and that the navigability of the Rio Grande at El Paso has been recognized and acknowledged by the Congress of the United States and the Secretary of War.

The bill further alleged that the proposed dam would be such an one as would check the flow of the river at Elephant Butte entirely for a greater portion if not the entire year, and impound it, and that such distribution of the waters of the river from said proposed dam would practically destroy the river as a stream for many miles below said point and diminish the volume of water below the dam *so as to materially affect the navigability of the Rio Grande River and impair navigation and commerce throughout its entire course from said proposed dam at Elephant Butte to the Gulf of Mexico.*

The bill further charges that the defendant company by means of the said dams *proposes to create the largest artificial lake in the world, to obtain control of the entire flow of the Rio Grande River in the southern part of New Mexico, and to secure a monopoly of all the waters suitable for irrigation in said Territory contiguous to the said river below the site of said proposed dam.* The bill alleges that said proposed building and construction are without the permission, authority, or approval of the Secretary of War, and contrary to the provisions of the act of Congress of September 19, 1890 (26 Stats., 454, sec. 10), and of section 3 of the act of Congress approved July 13, 1892 (27 Stats., 110).

Upon filing said bill, the court issued a temporary writ of injunction as prayed, and fixed the date for hearing. Subsequently, and before any hearing was had, the complainant filed an amended bill alleging, among other things, that "the Rio Grande River was navigable and had been navigated by steamboats for 350 miles from its mouth, and was susceptible of navigation up to La Joya, in the Territory of New Mexico, about 150 miles above Elephant Butte; and that the river, from some rapids located about 150 miles below El Paso to said town of La Joya, "has at different times been used for the purposes of floating and transporting rafts, logs, and poles, and that said portion of said stream is susceptible of being used and navigated for commercial purposes." The amended complaint also alleges, in substance, that the impounding of the waters at Elephant Butte, as contemplated by the defendants, would so deplete the flow of the water through the channel of said river "as to seriously obstruct the navigable capacity of the same throughout its entire course from said point at Elephant Butte to its mouth." It also sets out the provision in the treaty between the United States and the Republic of Mexico (known as the treaty of Guadeloupe Hidalgo) declaring that the Rio Grande, from the southern boundary of the Territory of New Mexico to its mouth, shall be free and common to the vessels and citizens of both countries, and that neither country shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of said right of free navigation, "and that neither party of said treaty has consented or authorized the construction of said dam."

By this amended bill another defendant, namely, the Rio Grande Irrigation and Land Company, Limited, a corporation organized under the laws of Great Britain, and having its principal office in London, was brought in as defendant, it being alleged by the amended bill that the last-named defendant was organized as an adjunct and agent of the original defendant for the purpose of securing capital for promoting the construction of its works, and that the original defendant, the Dam and Irrigation Company, had entered into a contract or agreement for the conveyance to its codefendant, the English company, of all the rights in and to said dams, etc., and that the said English company was pretending and attempting to possess and exercise all the rights, privileges, and franchises of the original defendant, and intended to erect and construct a dam, reservoir, etc., of the same nature and for the same purpose as set out in the original bill of complaint.

The amended bill expressly alleged that the impounding of the water of the river by the construction of a dam and reservoir at Elephant Butte, and the diversion of the waters and the use of the same for the purposes of irrigation, as intended by the defendants, would so deplete and prevent the flow of water through the channel of the river below the dam, when so constructed, as to seriously obstruct the navigable capacity of the river through its entire course from Elephant Butte to its mouth.

The prayer of the amended bill was substantially the same as that of the original bill, except that injunction was asked against both defendants.

To this amended bill the defendants filed two pleas, and also a joint and separate answer. The answer denies that the Rio Grande is a navigable river within the limits of the Territory of New Mexico. By their pleas they justify their right to construct the dam and impound and divert the waters under certain acts of Congress of October 2, 1888, August 30, 1890, and subsequent similar legislation, whereby it has secured, by compliance with the land laws of the United States, certain dam and reservoir sites formerly reserved, but later thrown open for acquisition.

The case was heard on motion to dissolve the injunction. No evidence seems to have been taken in the case, but a large number of public documents in the shape of maps, reports of exploring and surveying expeditions, and reports of special officers, were submitted to and read and considered by the court for the purpose of deciding the question of the navigability of the river *at the point in question*.

DECISION OF THE COURT BELOW.

The conclusion of the court was that the Rio Grande is not a navigable river above El Paso, and that the waters thereof are local waters under local control, and that their interruption and diversion is not a violation of any law of the United States or any treaty; that the bill of complaint as amended is without equity, and the temporary injunction should be dissolved.

The decision of the district court of the third judicial district was subsequently affirmed by the supreme court

of the Territory, from whose decree of affirmance this appeal is taken.

Practically, therefore, the question arises upon the facts stated in the bill of complaint, the cause having been heard substantially as though the defendants had demurred to the bill.

The acts of Congress referred to in the bill of complaint and in this argument, and the treaty with Mexico, are printed in the appendix to this brief.

On behalf of the United States, the following propositions will be maintained:

I.

The rule of prior appropriation of waters, the statutes of the Pacific States and Territories, and the acts of Congress of 1866, and the other statutes relating to the disposition and control of the public lands, have reference only to the proprietary rights of riparian owners, and do not have, and were not intended to have, any effect whatever upon the right of control which the United States exercise in their character of sovereign over navigable waters.

II.

Although a State may hold the title to lands under navigable waters within its limits, its title is different in character from that which the State holds in lands intended for sale. Such title is held in trust for all the people, and the sovereignty and control of the State can not be abdicated.

The same limitation applies to the National Government with respect to its power and control over navigation.

III.

The various acts of Congress relating to the use of waters in the reclamation of arid lands, and to the settlement and appropriation of Government lands, indicate no purpose whatever on the part of Congress to part with any power or control or rights of sovereignty or interest in the navigable waters of the United States.

IV.

The defendants propose to acquire the exclusive control of the Rio Grande at Elephant Butte, not for present and actual use, but for future and speculative profit, thereby vesting a monopoly of the water of the river in a single individual. Such a monopoly can not be acquired under the doctrine of prior appropriation, and is unlawful.

V.

The court erred in holding that the Rio Grande is not a navigable river above El Paso.

VI.

The threatened acts of defendants are within the prohibition of the act of 1890 (26 Stat., 454).

VII.

The defendants' proposed action is also forbidden by the act of 1892 (27 Stat., 110).

VIII.

Irrespective of the statutes of 1890 and 1892, the Federal courts have authority and jurisdiction to restrain by injunction, at the suit of the United States, the threatened injuries which defendants are preparing to commit to navigable waters.

IX.

If the proposed works of defendants, by damming the Rio Grande at Elephant Butte and diverting the waters of the river, will injuriously affect the navigability of the stream in its navigable part, it is immaterial that the works are located at a point where it is not navigable.

X.

The threatened acts of defendants, by destroying the navigability of the Rio Grande, will be constructively a violation by the United States of its treaty obligations with Mexico, and the United States are therefore bound to prevent such injuries.

XI.

The relative importance of the navigation of the Rio Grande and the irrigation of arid lands in New Mexico can not be taken into consideration in determining the questions in this case.

POINT I.

The rule of prior appropriation of waters, the statutes of the Pacific States and Territories, and the acts of Congress of 1866, and the other statutes relating to the disposition and control of the public lands, have reference only to the proprietary rights of riparian owners, and do not have, and were not intended to have, any effect whatever upon the right of control which the United States exercises in its character of sovereign over navigable waters.

THE COMMON LAW DOCTRINE OF RIPARIAN RIGHTS.

At common law the right of every riparian proprietor to the use of the stream is an incident to the ownership of the land bordering upon the stream, and arises *ex jure nature*. The right exists whether it is exercised or not, and the riparian proprietor may begin to exercise it when he will. It does not depend upon occupancy and is not limited by the prior occupation of others not amounting to an adverse enjoyment by prescription; but the rights of the different proprietors being equal, and each being entitled to the reasonable use of the same for any lawful purpose, it is wholly immaterial who is first in time. It is the right of the riparian owner at common law to have the stream flow in its natural channel without restraint, diversion, or pollution. If water is diverted from the stream by one riparian owner for any purpose except domestic uses, it must be returned again into the stream before reaching the lands of the riparian owner below.

THE DOCTRINE OF PRIOR APPROPRIATION.

In the Pacific States and Territories the common-law rule upon this subject is modified, owing to the peculiar

condition and interest of the settlers and miners upon public lands, and the right to running water exists without private ownership of the soil, upon the ground of prior location upon the land or prior appropriation of the water.

By this doctrine, as between persons who claim the water of a stream flowing through the public lands merely by the prior appropriation of the water itself, or by a prior location upon the land he has the best right who is first in time. The first appropriator is entitled to use and enjoy the water to the full extent of his original appropriation; to have its quantity unimpaired, so as not to defeat the purpose of such appropriation, and to remove obstructions from the natural channel. He may apply the water to any beneficial purpose without any obligation to return it to the stream from which it was taken, or to preserve its purity or quantity. He is equally entitled to have his right unimpaired by subsequent locators above as well as below him. (*Gould on Waters*, section 229; *Pomeroy on Riparian Rights*, par. 12, etc.)

The origin of this peculiar doctrine of prior appropriation is interestingly stated by Mr. Justice Field in the case of *Jennison v. Kirk* (98 U. S., 453, 457):

The discovery of gold in California was followed, as is well known, by an immense immigration into the State, which increased its population within three or four years from a few thousand to several hundred thousand. The lands in which the precious metals were found belonged to the United States, and were unsurveyed, and not open, by law, to occupation and settlement. Little was known of them

further than that they were situated in the Sierra Nevada Mountains. Into these mountains the emigrants in vast numbers penetrated, occupying the ravines, gulches, and canyons, and probing the earth in all directions for the precious metals. Wherever they went they carried with them that love of order and system and of fair dealing which are the prominent characteristics of our people. In every district which they occupied they framed certain rules for their government, by which the extent of ground they could severally hold for mining was designated, their possessory right to such ground secured and enforced, and contests between them either avoided or determined. These rules bore a marked similarity, varying in the several districts only according to the extent and character of the mines; distinct provisions being made for different kinds of mining, such as placer mining, quartz mining, and mining in drifts or tunnels. They all recognized discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. And they were so framed as to secure to all comers, within practicable limits, absolute equality of right and privilege in working the mines. Nothing but such equality would have been tolerated by the miners, who were emphatically the law-makers, as respects mining, upon the public lands in the State. The first appropriator was everywhere held to have, within certain well-defined limits, a better right than others to the claims taken up; and in all controversies, except as against the Government, he was regarded as the original owner, from whom title was to be traced. But the mines could not be worked without water. Without water the gold would remain forever buried in the earth or rock. To carry water to mining localities, when

they were not on the banks of a stream or lake, became, therefore, an important and necessary business in carrying on mining. Here, also, the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes was recognized as having, to the extent of actual use, the better right.

The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains. The waters of rivers and lakes were consequently carried great distances in ditches and flumes, constructed with vast labor and enormous expenditures of money, along the sides of mountains and through canyons and ravines, to supply communities engaged in mining, as well as for agriculturists and ordinary consumption. Numerous regulations were adopted, or assumed to exist, from their obvious justness, for the security of these ditches and flumes, and the protection of rights to water, not only between different appropriators, but between them and the holders of mining claims. These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them. For eighteen years—from 1848 to 1866—the regulations and customs of miners, as enforced and molded by the courts and sanctioned by the legislation of the State, constituted the law governing property in mines and in water on the public mineral lands. Until 1866, no legislation was had looking to a sale of the mineral lands. The policy of the country had previously been, as shown by the legislation of Congress, to exempt such lands from sale. In that year the act, the ninth section of which we have quoted, was passed.

The custom thus originating was soon approved by the courts, and the doctrine became and still is settled in California and other Pacific States and Territories, in opposition to the common law, that a permanent right of property in the water of streams or inland lakes, which wholly ran through or were situate upon the public lands of the United States, may be acquired for mining purposes by mere prior appropriation; that a prior appropriator may thus acquire the right to divert, use, and consume a quantity of water from the natural flow or condition of such streams or lakes which may be necessary for the purposes of his mining operations; and that he becomes, so far as he has thus made an actual prior appropriation, the owner of the water as against all the world, except the United States Government. This doctrine, applied at first to the operations of mining, has been extended to all other beneficial purposes for which water may be essential, including irrigation. (*Pomeroy on Riparian Rights, par. 15.*)

ACT OF 1866.

The right of property in running waters by appropriation thus recognized by the local courts and sanctioned by local legislation acquired no validity against the Federal Government, or its grantee, until the passage of the act of Congress of July 26, 1866 (14 Stat., 253).

Section 9 of that act is relied upon in this case as conferring upon the defendant the right to divert the waters of the Rio Grande River in the manner stated in the bill of complaint as against the Government of the United

States. It is necessary, therefore, to give some consideration to the proper meaning and construction of this section.

As enacted, the section reads as follows:

That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

The section above quoted was reenacted in the Revised Statutes as section 2339.

The purpose and meaning of this section are declared by Mr. Justice Field in the case of *Jennison v. Kirk* (98 U. S., 460), as follows:

It was for the purpose of securing rights to water, and rights of way over the public lands to convey it, which were thus recognized, that the ninth section was adopted, and not to grant rights of way where they were not previously recognized by the customary law of miners. The section purported, in its first clause, only to protect rights to the use of water for mining, manufacturing, or other beneficial purposes, acquired by priority of possession, when

recognized by the local customs, laws, and decisions of the courts; and the second clause, declaring that the right of way for the construction of ditches and canals to carry water for those purposes "is acknowledged and confirmed," can not be construed as conferring a right of way independent of such customary law, but only as acknowledging and confirming such right as that law gave. The proviso to the section conferred no additional rights upon the owners of ditches subsequently constructed; it simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. In other words, the United States by the section said that whenever rights to the use of water by priority of possession had become vested and were recognized by the local customs, laws, and decisions of the courts, the owners and possessors should be protected in them, and that the right of way for ditches and canals incident to such water rights, being recognized in the same manner, should be "acknowledged and confirmed;" but where ditches subsequently constructed injured by their construction the possessions of others on the public domain, the owners of such ditches should be liable for the injuries sustained. Any other construction would be inconsistent with the general purpose of the act, which, as already stated, was to give the sanction of the Government to possessory rights acquired under the local customs, laws, and decisions of the courts.

In the case of *Broder v. Water Co.* (101 U. S., 274), it was held that the act of 1866 merely confirmed to land owners the rights and privileges they had formerly enjoyed by local customs and the decisions of the local courts.

In the case of *Atchison v. Peterson* (20 Wall., 507), Mr. Justice Field further explains the reason and extent of this special doctrine, and says:

This equality of right (at the common law) among all the proprietors on the same stream would have been incompatible with any extended diversion of the water by one proprietor, and its conveyance for mining purposes to points from which it could not be restored to the stream. But the Government being the sole proprietor of all the public lands, whether bordering on streams or otherwise, there was no occasion for the application of the common-law doctrine of riparian proprietorship with respect to the waters of those streams. The Government, by its silent acquiescence, assented to the general occupation of the public lands for mining, and to encourage their free and unlimited use for that purpose, reserved such lands as were mineral from sale and the acquisition of title by settlement. And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor. So the miners on the public lands throughout the Pacific States and Territories, by their customs, usages, and regulations everywhere recognized the inherent justice of this principle; and the principle itself was at an early period recognized by legislation and enforced by the courts in those States and Territories.

Again, he says:

This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866. The right to water by prior appropriation, thus recognized and established as the law of miners on

the mineral lands of the public domain, is limited in every case, in quantity and quality, by the uses for which the appropriation is made.

The basis of this modification of the law of waters is a presumed license to the appropriator, the presumption arising out of the acquiescence of the proprietor. Thus it is said :

From a very early day the courts of this State have considered the United States Government as the owner of running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct from the lands, the State courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. (*Lux v. Haggin*, 10 Pac. Rep., 721; *Conger v. Weaver*, 6 Cal., 556, 557.)

From these considerations it is manifest that the act of 1866, section 9 (Rev. Stat., 2339), did nothing more than to recognize by Congressional enactment a construction which the courts of the Pacific States and Territories had placed upon the action or conduct of the Government under the denomination of a license. The statute turned into a positive consent that which before was only an implied consent.

In *Atchison v. Peterson* (20 Wall., 513), Mr. Justice Field says :

This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866.

See also *Basey v. Gallagher* (20 Wall., 670), where the doctrine as to appropriation for mining purposes was applied by this court to all other beneficial purposes for which water is essential.

In *Pollard's Lessee v. Hagan* (3 Howard, 212, 223), Mr. Justice McKinley, speaking for the Supreme Court, says:

When Alabama was admitted into the Union on an equal footing with the original States she succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States, for the temporary purposes provided for in the deed of cession and the legislative acts connected with it. Nothing remained to the United States, according to the terms of the agreement, but the public lands. And if an express stipulation had been inserted in the agreement, granting the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative, because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a State or elsewhere, except in the cases in which it is expressly granted.

He further says, on page 230:

This right of eminent domain over the shores and soils under the navigable waters, for all municipal purposes, belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to

transfer to a citizen the title to the shores and the soils under the navigable waters would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States, this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

By the preceding course of reasoning we have arrived at these general conclusions: First, the shores of navigable waters and the soils under them were not granted by the Constitution to the United States, but were reserved to the States respectively. Secondly, the new States have the same rights, sovereignty, and jurisdiction over this subject as the original States.

The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior or on the coast above high-water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purposes of commerce, navigation, and fishery, and for the improvements necessary to secure and promote those purposes, shall not be granted

away during the period of Territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community. (*Shively v. Bowlby*, 152 U. S., 1, 49, 50.)

Congress has the paramount right to control the navigable waters of the United States, whether tide waters, the lakes, or the rivers, so far as may be necessary for the regulation of commerce with foreign nations and among the States. (*Illinois Central R. R. Co. v. Illinois*, 146 U. S., 387.)

POINT II.

Although a State may hold the title to lands under navigable waters within its limits, its title is different in character from that which the State holds in lands intended for sale. Such title is held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. Such sovereignty and control can not be abdicated by a State.

Such abdication is not consistent with the exercise of that trust which requires the government of the State to

preserve such waters for the use of the public. (*Illinois Central R. R. Co. v. Illinois*, 146 U. S., 452, 453.)

The same limitation that applies to a State applies to the National Government. Congress can no more abdicate its trust over property in which the whole people are interested, like navigable waters, so as to leave them under the entire use and control of private parties, except in the instances of parcels for the improvement of navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its other sovereign powers in the administration of government and the preservation of the peace. (*Illinois Central R. R. Co. v. Illinois*, 146 U. S., 453.)

Mr. Justice Field, further, in the case above cited, on page 455, says:

The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and can not be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.

See also the opinion of Mr. Justice Bradley in the case of *Stockton v. Baltimore and New York Railroad Company* (32 Fed. Rep., 9, 19, 20), quoted and adopted by Mr. Justice Field in the *Illinois Central Railroad Case* (146 U. S., 456, 457), as follows:

It is insisted that the property of the State in lands under its navigable waters is private property,

and comes strictly within the constitutional provision. It is significantly asked, Can the United States take the State house at Trenton, and the surrounding grounds belonging to the State, and appropriate them to the purposes of a railroad depot, or to any other use of the General Government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the State house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that prior to the Revolution the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the Crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the State, as they were by the King, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris*; in other words, they were held for the use of the people at large. It is true, that to utilize the fisheries, especially those of shellfish, it was necessary to parcel them out to particular operators and employ the rent or consideration for the benefit of the whole people, but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true, that portions of the submerged shoals and flats,

which really interfered with navigation and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder.

The court below held that the United States, by the act of 1866, had surrendered its riparian rights, and assumed that such surrender carried with it a surrender of its control and sovereignty over navigable waters in so far as its recognition of the right of prior appropriation allowed a riparian owner, above the head of navigation, to divert the waters of the stream, even though navigation might thereby be entirely destroyed.

It is evident, from the considerations above expressed, that Congress could not thus part with its control over navigable waters and give a valid consent to the destruction of this public right. Nothing in the legislation of Congress indicates that it had any such intention. On the contrary, it is evident that all its legislation was intended to refer to its proprietary right in public lands, and so far as its legislation affected the waters of lakes, rivers, etc., it was intended to apply to waters which were not navigable, or to such use thereof as would not affect injuriously the right of navigation.

By the act to provide for the sale of desert lands in certain States and Territories, approved March 3, 1877 (19 Stat., 377), it was made lawful for any citizen to file a declaration that he intends to reclaim a tract of desert land by conducting water upon the same: "*Provided, however, That the right to the use of water by the person so conducting the same on or to any tract of desert land of*

640 acres shall depend upon bona fide prior appropriation, and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use; together with the water of all lakes, rivers, and other sources of water supply upon the public lands, and *not navigable*, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights."

POINT III.

The different acts of Congress with reference to the use of waters in the reclamation of the arid region are mentioned in the opinion of the supreme court of New Mexico, in this case, on page 7. An examination of these acts and of all the other acts of Congress relating to the settlement and appropriation of Government lands will indicate no purpose whatever on the part of Congress to part with any power or control or right of sovereignty, or interest in the navigable waters of the United States.

It is not denied but what there may be proper use made for purposes of irrigation, mining, etc., of the waters of streams which are navigable at their lower extremity and not at their upper extremity, so as not to interfere with nor injure navigation.

All the acts of Congress and grants and proceedings of the Land Office relating to reservoir sites, etc., will be construed as intended to be consistent with a use which shall not be detrimental to navigation. They are not to be construed as granting a right, which Congress had no power to grant, of impairing or destroying navigation.

"Nothing passes against the King by implication" is a maxim founded on strong grounds of public interest. What a man asserts is his, as against the common right, he should show express title for.

POINT IV.

The defendants propose to acquire the exclusive control of the Rio Grande at Elephant Butte, not for present and actual use, but for future and speculative profit, thereby vesting a monopoly of the water of the river in a single individual. Such a monopoly can not be acquired under the doctrine of prior appropriation, and is unlawful.

Whenever a private person, as preemtor, homestead settler, or other purchaser or grantee, has acquired title from the United States to a tract of the public land bordering upon a stream or lake within a State, any subsequent appropriation of the waters thereof by another party is subject to his prior rights as a riparian proprietor, whatever those rights may be under the municipal law of the State; and, as against such subsequent appropriator, his rights as riparian proprietor are complete. (Pomeroy on Riparian Rights, par. 43, and cases there cited.)

In order to make a valid appropriation of waters upon the public domain, and to obtain an exclusive right to the water thereby, the fundamental doctrine is well settled that the appropriation must be made with a *bona fide* present design or intention of applying the water to some immediately useful or beneficial purpose. (Pomeroy on Riparian Rights, par. 47, and cases there cited.)

The doctrine of prior appropriation arising out of the customs and practices of individual miners in the Pacific settlements affords, historically, a basis upon which to found the proper limitations upon the extent of water which may be appropriated. It is obvious that each person's right was naturally limited by his particular interest, so that it is fair to assume that no one had the right to appropriate more water than was needed for his particular uses. So we find it stated in Pomeroy on Riparian Rights that—

The system places an obstacle in the way of a prior appropriator's obtaining an exclusive control of the entire stream, no matter how large, and secures the rights of subsequent appropriators of the same stream, by requiring that a valid appropriation shall be made for some beneficial purpose, presently existing or contemplated; and by restricting the amount of water appropriated to the quantity needed for such purpose; and by forbidding any change or enlargement of the purpose which should increase the quantity of water diverted under the prior appropriation, to the injury of subsequent claimants; and by subjecting the prior appropriation to the effects of an abandonment, by which all prior and exclusive rights once obtained would be lost. *By these means a party is, in theory, at least, prohibited from acquiring the exclusive control of a stream, or any part thereof, not for present and actual use, but for future, expected, and speculative profit or advantage. In other words, a party can not obtain the monopoly of a stream in anticipation of its future use and value to miners, farmers, or manufacturers.* (Par. 91.)

In *Bacey v. Gallagher* (20 Wall., 670, 683), Mr. Justice Field, speaking of this particular right or prior appropriation of water, says:

This right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, *and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.* See also *Atchison v. Peterson* (20 Wall., 507, 514).

The bill of complaint alleges that it is the purpose of the defendant to construct from 50 to 5,000 miles of canals, ditches, and pipe lines to supply water, for which it proposes to construct dams across the Rio Grande at such points as may be necessary to carry out those objects, and to impound the waters of the river in unlimited quantities in dams and reservoirs and distribute the same through said canals, ditches, and pipe lines.

This is not a use consistent with the rules that obtain governing the right of prior appropriation.

It is the establishment of a speculative monopoly.

The prospectus of the defendant company alleges (Rec., p. 31) that the company by the means of its works will obtain control of the entire flow of the Rio Grande River in southern New Mexico, and in controlling the water the company will, to a great extent, control the irrigable lands. That the remaining land owners must, in order to render their properties of value, concede a large portion of their lands for water rights, or purchase said water rights at the ruling rate from the company. (Rec., p. 32.)

In order to illustrate to the court the preposterous claims of this British corporation, I think it proper to call attention to an extract from a communication to the Secretary of State of the United States from Col. W. J. Engledue, chairman of the Rio Grande Irrigation and Land Company, under date of December 14, 1897, wherein he refers to this pending case, and forwards, as an expression of the views of his company, an address delivered by him at the general meeting of the shareholders on December 3, 1897.

In that address he says:

The company's titles were legally acquired under the Territorial laws of New Mexico and the Federal laws of the United States, the vendor company's right to impound and appropriate the waters of the Rio Grande having been finally and formally recognized by the late Secretary of the Interior, a member of Mr. Cleveland's Cabinet. Each American State, being a sovereignty within itself, enjoys what is termed State rights or home rule, and the Federal authorities at Washington having formally authorized, under a Cabinet minister's signature, the construction of the company's works, having no power, notwithstanding the terms of the treaties with Mexico, to interfere with our diversion in New Mexico of the waters of the Rio Grande for irrigation purposes.

Further on in the same address occurs the following:

As your chairman, I have already officially notified the State Department, the Secretary of State, and the Attorney-General of the company's intention to proceed to recover damages from the United States for injury to our works, loss of credit, and

losses sustained through delay consequent upon the Government's injunction, as soon as a proper estimate as to the extent of the injury and losses sustained can be arrived at, and in the correspondence that has passed between the company and the Department of State the company's rights have been valued at between £2,000,000 and £3,000,000 sterling. Manifestly, the most inexpensive and satisfactory way out of the difficulty will be for the United States to subsidize the company as proposed.

POINT V.

The court erred in holding that the Rio Grande River is not a navigable stream above El Paso.

Although Government reports of Army officers, agents of the Interior Department, and specially detailed investigators were read and considered by the court, they were not properly in evidence, and could not lawfully be referred to in determining the equity of complainant's bill.

The bill of complaint alleged as a matter of fact the navigability of the river from a point above Elephant Butte to the mouth. (Rec., p. 17, par. 6.) By the pleadings, issue was joined upon the question of fact as to the navigability of the river at Elephant Butte. That issue was not tried, but the court, taking judicial notice of a disputed fact, decided it on a motion upon which the truth of all complainant's allegations of fact was by the rule of pleading and procedure admitted.

By the common law a river is *prima facie* navigable only so far as the tide ebbs and flows, and in case of doubt the burden of proof is upon those who allege

navigability above that point. But the courts take notice of those characteristics of streams which are matters of general history or common knowledge. (Gould on Waters, sec. 112; *Bowman v. Wathen*, 2 McLean, 376.)

The judges do not assume any private or technical information of the matter, *but they simply recognize the fact as being already sufficiently established*. When such fact is of universal application, it will be judicially noticed generally; but when its operation is absolute within certain limitations, it will only be recognized within the jurisdiction to which the same extends. Thus impressed with absolute verity, such facts may be embraced in instructions to juries without infringing upon their province of determining issues of fact. (Amer. and Eng. Ency., Law, vol. 12, p. 151. Judicial notice. *Brown v. Piper*, 91 U. S., 37.)

That this river is navigable for a very considerable distance above its mouth is a notorious fact, not disputed, and is recognized by our treaty with Mexico. But the question here is, How shall the fact of its navigability or otherwise, at the point in question, be determined? Will the court take judicial notice of what is the fact, or is it a question of fact to be determined by proof?

It would seem that the statement in 16 American and English Encyclopædia, Law, page 245, that "Navigable capacity is generally a question of fact, and the burden of proving it is on the party alleging the same; but the courts of some States will take judicial notice of the navigability of streams" fairly states the result of the authorities. And it may be added that the Federal courts sometimes do so also. But what is the distinguishing

criterion by which it may be determined when courts will and when they will not take such notice is not very apparent, and yet would seem to be fairly indicated by the authorities and by general principles.

It would seem both upon principle and upon authority that courts will take judicial notice of such facts only as are certain, not doubtful, uncertain, or susceptible of disproof, and those as to which opinions can not reasonably differ. This is so, because the court assumes to know that they are both true and notorious, which can not be done in case of any uncertainty or doubt. The whole theory upon which judicial notice proceeds is that the fact is not only certainly true, but also that its truth is so notorious that everyone ought to know it; and that a court will not pretend to be ignorant of that which is generally known.

In 12 Am. and Eng. Ency. Law, 151, this is stated in this way:

The admissibility of those classes of facts which are in their nature official, political, historical, geographical, commercial, judicial, legislative, scientific, or artistic can be *accurately determined*; but, in addition to these, notice will be taken of a wide range of matters of natural occurrence and of those arising in the usual course of life, the recognition of which *depends upon the completeness of their certainty and notoriety*. With regard to such facts, care must be taken that the requisite notoriety exists. This power of judicial notice is to be exercised with caution. Every reasonable doubt upon the subject should be resolved promptly in the negative.

And this is the consensus of the authorities.

In other words, that of which a court will take judicial notice must be certainly true, and notoriously true. And it must be so certainly and notoriously true that courts will not permit proof to the contrary, upon principle. This necessity results from the fact that the court does take judicial notice of the matter; for it would be absurd for a court to say that a matter is so certainly and notoriously true that the court can say, *ex cathedra*, that it is a fact, and at the same time admit proof that it is not a fact. And so are the authorities.

The primary effect of judicial notice is to dispense with the proof of some fact. To the extent that this is done, the power of the jury, as triers of fact, is limited and circumscribed, and the power of the court to decide upon the existence of a fact, as a matter of law, and by its decision to bind the jury, is correspondingly enlarged. To permit the court to take judicial notice of obvious and familiar facts is equivalent to enunciating a rule of law that such facts are to be considered by the jury as conclusively proved and as obligatory upon them. This view of the matter is confirmed by the constant practice of the courts, in refusing not only to permit the introduction of evidence to prove the fact, but of evidence to disprove its truth as well. (Underhill on Ev., 364.)

Under this rule courts will in a proper case take judicial notice that parts of the Potomac, Mississippi, Hudson, and other large streams are navigable, and yet in most cases, at least, there is a point where each of these streams ceases to be navigable, and the point where courts will refrain from taking judicial notice is the point where navigability ceases to be certain, and so apparent

and notorious that there can be no reasonable doubt or question about it.

Thus, in *Buffalo Pipe Line Co. v. N. Y., L. E. & W. R. R. Co.* (10 Abb. N. C., 107), one paragraph in the syllabus says: "Streams of less magnitude, which are in fact navigable for portions of the year, but their capacity is not historical or traditional, and the court can not take judicial notice of their character, but must rely upon evidence to ascertain their capacity and the use which may be made of them."

Because the affirmative existence of facts is easier and better known, more traditional and notorious, a court might well take notice that a large stream was navigable when it would not that a smaller one was not navigable, as in the case last cited. And in *Wood et al. v. Fowler et al.* (26 Keen, 682), it is said in the syllabus that "courts will take judicial notice of the navigability of large rivers," and in the opinion by Brewer, J., it is said (p. 687):

Indeed, it would seem absurd to require evidence of that which every man of common information must know. To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller or less-known streams, and yet, within the limits of any State, the navigability of its *largest* rivers ought to be generally known, and courts may properly assume it to be a matter of general knowledge and take judicial notice thereof.

The two cases last cited seem to fairly state the law, both upon principle and authority, viz: That courts will

take judicial notice of the character, as to navigability, of the large rivers, because their navigability is *certain* and notorious; but as to the smaller streams, about which there may be uncertainty or question, they will leave the question of navigability to be proved as other disputed facts are proved.

A stream may be nonnavigable from one or more of several causes—an insufficient supply of water, obstructions, etc.—and, except in extreme cases, the sufficiency of these causes to destroy or prevent navigable character must generally be a matter of more or less uncertainty and dependent upon proof—a question of fact, in short, and not one of law.

It would seem also, on principle, that the matters of which a court will, on trial, take notice judicially, without any averment or proof in respect to them, must be such as come collaterally or incidentally into the case, as distinguished from those which constitute one of the issues of fact made or tendered by the pleading. Perhaps there are extreme cases when a court might decide them only as one of the main issues of fact upon which the case depended upon its own judicial knowledge of what the fact was. But upon such a matter as the disputed navigability of a stream, except one of the clearest character, it would seem that the only proper course is to try such an issue according to the regular and accepted mode, viz, by proof. And such appears to be the view taken in 1 Phillips Ev. (4 Am. ed., 618), where it is said:

The principle upon which certain matters are judicially noticed, without any proof being required

in respect to them, appears to be partly that they are of such general and public notoriety that every subject of the realm may fairly be presumed to be acquainted with them; and, partly, that the matters so noticed are generally quite collateral to and unconnected with the point in issue, and are of such a kind that there is no risk in dispensing with the strict formal proof.

And in the paragraph above quoted from Underhill on Evidence, 364, it is said:

The time of courts should not be taken up, nor should the parties to the action be put to needless expense, in taking evidence to prove facts which are merely collateral to the point in issue, and which are within the knowledge of all persons of average education and intelligence.

In support of this is the fact that there is no case, so far as I have found, where the court has, upon its own judicial knowledge alone, decided a material issue of fact made in the case, or where it has thus decided a matter of fact against the uncontradicted averment of a party in his pleading. In the cases referred to in 16 Am. and Eng. Ency. Law, 245, before referred to, where it is stated that "The courts of some States will take judicial notice of the navigability of streams," as well as in the other cases where the same thing has been held, it does not appear that such navigability or unnavigability was either in issue or averred by one of the parties, but while material, the matter arose collaterally and in the absence of averment.

That courts do not and should not generally take judicial notice of the navigability or unnavigability of streams,

except, indeed, the large rivers, is apparent from another consideration. Matters of which judicial notice is taken should not be pleaded or averred. Whatever may be properly averred, may be proved or disproved. But neither is permitted as to matters of judicial cognizance. Therefore, if the character of streams as to navigability or otherwise is generally a matter of judicial notice, it can never be permissible to aver that a stream is or is not navigable, for the court will take notice of what its character is in this respect. And yet, the uniform practice is, and always has been, to aver such fact when it is claimed; which is quite inconsistent with the idea that courts will take judicial notice of it without averment, and will not allow it to be proved or disproved.

Courts take judicial notice of those facts which are of common knowledge, but there is no such basis for the exercise of judicial notice where the fact is vigorously disputed by the parties in the case—where, indeed, the very question (as in this case) is one of the main questions of fact put in issue by the pleadings between the parties.

The only indications of the navigability of the river in this locality which the court could properly take notice of were the acts of Congress of 1882 and 1888, authorizing the construction of a bridge across the river at El Paso. (Rec., pp. 74-76.)

Both these special acts provided that the structures authorized shall not interfere with the free navigation of the river, showing that Congress regarded the river as navigable at El Paso. And if at El Paso, presumably also up as high as the next natural obstruction, which is

at La Joya, 100 miles above Elephant Butte. (Amended bill, p. 18.)

The opinion of this court in *Egan v. Hart* (165 U. S., 188) is not inconsistent, but in harmony with the position of the Government in this case.

1. The question as to the navigability of the Bayou Pierre was tried by the State court upon evidence, and not decided upon "judicial notice."

2. The Supreme Court inferentially holds that if the proposed obstruction would interfere with the navigability of the stream below, it would be unlawful; but that the trial court, as a matter of fact, had found it would not so interfere, and its decision on such matter of fact was not to be reviewed.

POINT VI.

The threatened acts of defendants are within the prohibition of the act of 1890 (Appendix, p. 57).

That act declares that the creating of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction is prohibited.

Observe the broad generality of this language.

"Navigable capacity;" that is, the extent to which such waters are able to accommodate navigation, including depth of water, as well as length and width of stream.

"Waters," including rivers, lakes, bays, harbors, etc.

"In respect to which the United States has jurisdiction." Not "over which," or "on which," or "in which," but "in respect to which," thereby including every possible feature of Congressional regulation and control.

POINT VII.

The defendants' proposed action is also forbidden by the act of 1892 (27 Stats., 110; Appendix, p. 58).

Condensed, that act provides, section 3:

It shall not be lawful to build any * * * dam
* * * in any navigable waters of the United
States * * * without the permission of the
Secretary of War, in any * * * navigable
river or other waters of the United States in such
manner as shall obstruct or impair navigation, com-
merce, or anchorage of said water, * * * or in
any manner to alter or modify the * * * con-
dition or *capacity of any* * * * *channel* of any
navigable water of the United States, unless ap-
proved and authorized by the Secretary of War.

POINT VIII.

Irrespective of the statutes of 1890 and 1892, the Federal courts have authority and jurisdiction to restrain by injunction, at the suit of the United States, the threatened injuries which the defendants are preparing to commit to navigable waters.

In *Gilman v. Philadelphia* (3 Wall., 713, 724) this court declared:

The power to regulate commerce comprehends the control for that purpose, *and to the extent necessary*, of all the navigable waters of the United States which are accessible from a State other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and

free from any obstruction to their navigation, interposed by the States or otherwise; to remove such obstructions when they exist, and to provide, by such sanctions as they may deem proper, against the occurrence of the evil and for the punishment of offenders. For these purposes Congress possesses all the powers which existed in the States before the adoption of the National Constitution, and which have always existed in the Parliament in England (p. 586).

Georgetown v. Canal Co., 12 Pet., 91-98; *Mining Co. v. South Carolina*, 144 U. S., 550; *In re Debs*, 158 U. S., 564-599:

We hold that the Government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that, while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is transmitted power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the National Government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce, or the carrying of the mail; that while it may be competent for the Government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist,

or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority (p. 599).

POINT IX.

If the proposed works of the defendants will injuriously affect the navigation of the Rio Grande in its navigable part, it is immaterial that the works are located at a point where it is not navigable.

This proposition seems too self-evident to require argument, although it is negatived by the decision of the court below.

If the law is otherwise; if the United States has power to prevent the destruction of its navigable streams only when the acts of destruction are committed at a point at which the stream is actually navigable, then the Federal Government has not, as it has been supposed to have, full and complete power to preserve and protect navigation for the purpose of interstate and international commerce.

It is immaterial whether an obstruction is placed midway of the channel where vessels pass, or whether the water is turned off from above. The effect is the same in both cases. The crime of murder may be committed by starvation as well as by direct violence.

Even though the Rio Grande is not navigable in New Mexico, it is concededly navigable for many miles along the borders of Texas and Mexico. The treaty of 1848 so recognizes it. The bill alleges that the works of the defendants as proposed will, if constructed, so deplete

and prevent the flow of water through the channel of said river below said dam as to seriously obstruct the navigable capacity of said river throughout its entire course from Elephant Butte to its mouth. (Rec., p. 18, par. 7.) This allegation of injury, as the court heard the case, stood admitted.

Indeed, the court below expressly holds that such fact is immaterial, for the reason that such diversion as the defendants propose to make is not a violation of any law of the United States or of any treaty, if done upon a stream at a point above the head of navigation.

Broadly stated, the decision of the court of New Mexico is that, under the laws of the United States and of that Territory, it is lawful to divert entirely all the water in the Rio Grande River as it flows through New Mexico, and to use it for local purposes; and if thereby the navigability of the stream below is destroyed, still no legal wrong has been committed and no Federal law or treaty violated.

This astounding conclusion is attempted to be sustained by an application of the peculiar law of prior application of running water which prevails in the Pacific States and Territories, and of certain land laws of the United States.

If this were a diversion affecting only the rights of riparian owners upon the stream below in their character of proprietors, then it would be immaterial whether the common law of riparian lands or the peculiar rule of prior appropriation prevails. The Federal Government is not concerned about mere invasions of private right.

The wrong it seeks to prevent is to the public right—the right of navigation and obligation of its treaty.

No proper construction of the riparian laws of the Pacific States, nor any proper interpretation of the land laws and policy of the Federal Government can give any sanction to such a doctrine as is enunciated by the court of New Mexico in this case.

The conflict between the rights of miners and other users of the water of a stream for the special purposes required in the Pacific States, and those interested in the navigability of the stream at a point below, was fully discussed by Judge Sawyer in the very important case of *Woodruff v. North Bloomfield Gravel Mining Co.*, 18 Fed. Rep., 753 (1884).

In that case the defendants were engaged in hydraulic mining to a very great extent in the Sierra Nevada Mountains, and were discharging their mining débris, rocks, pebbles, gravel, and sand to a very large amount into the headwaters of the Yuba, a river rising in the Sierra Nevada Mountains, and forming one of the headwaters of the Sacramento River. The débris thus discharged filled up the natural channel of the Yuba above the level of its banks, and also of the Feather, another river into which the Yuba flowed, below the mouth of the Yuba, to a depth of 15 feet or more, lessening and injuring the navigability of both streams. In that case it was expressly claimed on behalf of the defendants that Congress by the act of 1866, and the legislature of California by statutes similar to those of New Mexico, had authorized the use of the navigable waters of the Sacramento and Feather rivers for the flow and deposit of

mining débris, and having so authorized their use, all the acts complained of were lawful, and the results of those acts, therefore, could not be a nuisance, public or otherwise. The same Federal legislation relied upon in this case was cited and relied upon in that case. I make the following citations from the opinion of Judge Sawyer:

It is not pretended that either Congress or the legislature of California has anywhere in express terms provided that the navigable waters of the State may be so used, but this authority is sought to be inferred from the legislation of both bodies, recognizing mining as a proper and lawful employment, and encouraging this industry, knowing that mining of the kind complained of could only be carried on successfully by discharging the débris into the streams in the mining regions, which must, from the necessity of the case, find its way into the navigable waters of the State. As to Congress, it might be sufficient to say that it has no authority whatever to say what shall or what shall not constitute a nuisance within a State, except so far as it affects the public navigable waters, and interferes with interstate or foreign commerce, or obstructs the carrying of the mails. Under its authority to regulate commerce between the States, and establish post roads, Congress may doubtless declare and punish as such the obstruction of the navigable waters of the State as a nuisance to interstate and foreign commerce, but there its authority ends. The necessary results of the acts complained of clearly constitute a public and private nuisance, both at common law and within the express language of the civil code of California (pp. 770, 771).

Had all these lands on the shed water of the Yuba, or all lands in the State containing mines,

been owned under a Spanish grant by a private party, as was the Merced grant, confirmed to Fremont, the owner of the lands might have made precisely such regulations as to the sale or working of the mines and giving water rights and other easements in his lands as the United States have done by their legislation, and with precisely the same effect. Had such been the case, would counsel for a moment have pretended that by such regulations he intended to subordinate the navigable waters of the State, and the rights of all property holders on the waters of the State below, to the use of his grantees of mines? Yet the inference that he did so intend would be just as legitimate as the inference that Congress so intended by the legislation relied on; and if he so intended, he had just as much power to give effect to his intention as had Congress (pp. 775, 776).

Congress is authorized to "*regulate*," but not to *destroy*, "commerce among the States." It may, undoubtedly, in its wisdom, obstruct, or perhaps destroy, navigation to a limited extent at particular points for the purpose of its general advantage and improvement on a larger general scale, such, for example, as by authorizing the building of a railroad or post-road bridge across a navigable stream, but it can not destroy or authorize the destruction, entire or partial, of the whole system of navigable waters of a State for purposes wholly foreign to commerce or post roads, or to their regulation. If Congress could so authorize, or, as is claimed, has so authorized, the acts complained of as to make them lawful, then it can authorize, and it has authorized, the filling up and utter destruction of all the navigable rivers, streams, and bays of the State, for there is no limit fixed to the amount of débris that

may be sent down; and upon the hypothesis claimed, if such waters are not filled up and destroyed, it is for want of physical capacity to do it, and not because it is unlawful (pp. 778, 779).

Again, so far as any legislation is concerned that would attempt to authorize the filling up of the navigable rivers and bays of the State, to the destruction or material injury of their navigation, it must be void for want of power on other grounds. We have seen that the title to the soil under the navigable waters of the State immediately connected with the ocean, and within the ebb and flow of the tides, is in the State. (*Pollard's Lessee v. Hagan*, *supra*.) In the case of fresh water rivers, however, above the ebb and flow of the tides, not in a proprietary sense; in such waters the proprietary right to the soil under the water is, ordinarily, in private parties (*Jones v. Souldard*, 24 How., 65; *Smith v. City of Rochester*, 92 N. Y., 463; *Chenango Bridge Co. v. Paige*, 83 N. Y., 185); but whether in the State in a proprietary sense or not, the title is, nevertheless, in the State, in a governmental sense, as a part of its sovereign domain—a part of its municipal sovereignty—held in trust for all, to protect, preserve, and improve for the purposes of navigation and the benefits of commerce, and not otherwise.

There are two senses in which the rights of the State are to be considered—one proprietary and the other governmental; proprietary as where the State owns an absolute fee in the land in the same manner and sense, with the same rights and powers, as an individual owns his land; and governmental as where the title is held in trust for the use of the public, such as highways, navigable streams, etc. The former is alienable, *the latter inalienable*. If the

State can be considered as holding a proprietary interest in the soil, under navigable fresh-water rivers, still, the alienation of such proprietary interest would, necessarily, be subject to the *inalienable* sovereign right of the State to control it for the proper public uses and trusts for which it is held in the interest of commerce and of all the people (*Smith v. City of Rochester*, 92 N. Y., 477, 478). Says the court, by the chief justice, in that case, citing as authority *Martin v. Waddell* (16 Pet., 367): "While a sovereign may convey its proprietary rights, *it can not alienate its control over navigable waters without abdicating its sovereignty.*" (Id., 484.) Again, quoting Judge Earl in *Chenango Bridge Co. v. Paige* (83 N. Y., 178), the court says: "The legislature, except under the power of eminent domain, upon making compensation, can interfere with such streams only for the purpose of *regulating, preserving, and protecting the public easement. Further than this it has no more power over fresh-water streams than over private property.*" (Id., 485.) If the legislature can not interfere with such streams for purposes other than those mentioned it certainly can not authorize them to be filled up with débris from mines, or otherwise, to the destruction of the public easement—the right of navigation. (pp. 784, 785.)

This case points out, with strong emphasis, that the act of 1866 and acts of 1870 and 1872 relate only to the disposition of public lands of which the Government was proprietor, and that they were never intended to affect the rights of private persons in navigable parts of the streams, or to subordinate the very existence of the navigable waters of the States to the use of private parties above.

The supreme court of California has held to the same effect. (See *People v. Gold Run Ditch and Mining Co.*, 66 Cal., 138.) In this case the defendant was a ditch and mining company, running water ditches and mines and working its mines by the hydraulic process. The effect of its work was to discharge into the American river, a navigable stream, large quantities of gravel, sand, and other refuse material. Other mines than those of the defendant were worked by the hydraulic process, and debris from these mines was also deposited in the American River. All of this refuse material was carried down the river by the force of the current and deposited in the Sacramento River, a stream of which the American River is a tributary. The result was to fill the channel of the Sacramento River so as to materially impair navigation. Held, that these acts of the defendant constituted a public nuisance, which might be enjoined in an action instituted by the attorney-general in the name of the people of the State, and that the action could be maintained against the defendant, notwithstanding the fact that other persons were committing similar wrongs, and without joining such other persons who contributed to the injury.

Congress has expressly provided by statute for the regulation of hydraulic mining so as to prevent injury from that cause to navigable waters. See act of March 1, 1893 (27 Stat., 507).

Hydraulic mining is not usually carried on upon navigable parts of streams, but above the point of navigation. Congress, therefore, by this legislation impliedly asserts its authority to prevent any and all acts injurious to navigable streams, no matter where such acts are performed.

POINT X.

The threatened acts of the defendants, by destroying the navigability of the Rio Grande River, will be constructively a violation by the United States of its treaty obligations with Mexico, and the United States is therefore bound to prevent such injuries.

Articles 5 and 7 of the treaty between the United States and Mexico of February 2, 1848, read as follows (9 Stats., 922):

ARTICLE 5. The boundary line between the two republics shall commence in the Gulf of Mexico, 3 leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one to the point where it strikes the southern boundary of New Mexico; thence westwardly, along the southern boundary of New Mexico (which runs north of the town called *Paso*), to its western termination; thence northwardly, along the western line of New Mexico, until it intersects the first branch of the river Gila (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch and of the said river until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between upper and lower California, to the Pacific Ocean.

ARTICLE 7. The River Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico being, agreeably to the fifth

article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both Governments.

The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits.

By the treaty between Mexico and the United States, known as the Gadsden treaty, of December 30, 1853 (10 Stats., 1034), the following modification of the treaty of 1848 was made:

The several provisions, stipulations, and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte below the initial of the said boundary provided in the first article of this treaty; that is to say, below the intersection of the $31^{\circ} 47' 30''$ parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upward, according to the fifth article of the treaty of Guadalupe.

The parallel of latitude mentioned in this latter treaty crosses the boundary a short distance below El Paso.

The Rio Grande, therefore, along what is practically the whole boundary between Texas and Mexico is made free for the common navigation of the vessels and citizens of both countries, and it is expressly stipulated that neither country shall, without the consent of the other, construct any work that may impair or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation.

The court below seemed to think that this covenant was limited to the construction of works in the navigable part of the stream. To hold that this is the limit of the obligation would seem to come short of a reasonable and just interpretation of international duty.

The court below, admitting that navigation was to be common to the citizens of both countries, declared that it was not a consequence of this declaration that the United States was bound to preserve or contribute the water to make navigation possible. The right to the use of a thing carries with it the right to all such accessories as are necessary to maintain the thing used.

It is submitted, whether the United States ought, in honor and good faith, to accept any such interpretation of its treaty obligations as is made by the supreme court of New Mexico. The United States is bound, in good faith, to see that no act of its citizens, no matter where performed or under what pretext, shall destroy the substantial right reserved by the treaty for the use of the citizens of Mexico.

The right of navigation of rivers flowing through different sovereignties, like the Rhine, the St. Lawrence, and the Mississippi prior to the Louisiana purchase, has been one of the great topics of argument in international law. It is unnecessary here to discuss the extent of such right as a principle of that branch of jurisprudence. The right in this instance is expressly defined and created by treaty obligation between the United States and Mexico.

Even in the absence of a treaty it would never be asserted by anyone, and no basis for the declaration of such a doctrine can be found in any of the writers upon international law, that the Government through whose territory the upper part of a navigable river runs could turn the channel of the river into a different course and prevent its natural flow through the territory of a neighboring power below. Yet that is practically the right which is asserted by the decision of the court of New Mexico in this case.

In this connection, the reasons advanced on behalf of the United States in support of their claim of a right to navigate the St. Lawrence River to and from the sea, in the controversy which took place between this Government and Great Britain in 1826, are interesting and important.

This right was rested on grounds of natural right and obvious necessity existing independently of any treaty regulations. (Lawrence's *Wheaton on International Law*, edition of 1863, p. 356.)

The principle upon which the right of the United States was asserted was that the right to a thing gives a right to the means without which it could not be used—

that is to say, that the means follow the end; and it was declared that this principle was founded in natural reason, was evidenced by the common sense of mankind, and declared by writers on international law. (Lawrence's Wheaton, p. 355.)

Does not the proper application of this principle require its application to this case as forbidding this country to injure, by internal acts committed above the point of navigability, the rights and privileges of navigation of a neighboring nation in the parts of the stream which are navigable and common to both countries?

I do not wish to be understood as implying that this Government is under any restrictions as to uses of the water which do not injure navigation. It is only in respect to navigation that the use of the river is made common.

POINT XI.

The relative importance of the navigation of the Rio Grande and the irrigation of arid lands in New Mexico can not be taken into consideration in determining the questions in this case.

The supreme court of New Mexico, in its opinion, by several expressions seemed to imply that it had a right to balance advantages and inconsistencies, and to decide the question of the relative importance of the right of navigation and the privilege of irrigation. On page 6 of the opinion, the court said:

Here the paramount interest is not the navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure

of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose would be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads, with which these comparatively insignificant streams could not compete. But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and if such use were denied them, it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity.

On page 9 the court further said :

From the foregoing discussion of the legislation of Congress and the conditions prevailing in the region under consideration, it would seem to follow that if there were a conflict between the interests of navigation and agriculture in relation to a stream like the Rio Grande that of the latter would prevail. Certainly it should be held to be under the protection of the courts against any doubtful interpretation or application of a penal statute. If the waters of the Rio Grande are not navigable in New Mexico, which we hold to be the case, then they can not be said to be waters in respect of which the United States has jurisdiction. And certainly, in the absence of some express declaration to that effect, it can not be supposed that Congress intended to strike down and destroy the most important resource of this vast region in order to promote the insignificant and questionable benefit of the navigation of the Rio Grande for a short distance above its mouth.

Again, on page 9, the court said :

And in view of the condition and history of the region which would be affected, the unimportance of the Rio Grande as a waterway for commercial intercourse at any point, its nonnavigability at the place of the proposed construction and for hundreds of miles below, and the evident purpose of Congress, by its legislation, to promote irrigation throughout this portion of the country, even to the extent of further obstruction of this very stream, it would, in our opinion, be unreasonable to hold that legislation which has a definite and well-understood purpose in furtherance of the public interest in those portions of the country to whose conditions it is applicable was intended to operate to the detriment of the public interests in regions to whose conditions it is not applicable and where its enforcement would be destructive of the very interests which the legislation of Congress has otherwise undertaken to promote.

This view ought not to be entertained or countenanced by the United States Government. If the right of navigation exists and is useful for purposes of interstate or international commerce, then neither the United States nor any State has the power to destroy it because some other interest, not relating to commerce, will be thereby benefited. The primary use of waters is for navigation. Their use for rendering valuable tracts of arid land which heretofore have always been valueless must be conditioned upon not interfering injuriously with the rights of navigation.

It is submitted that the decree of the court of New Mexico was erroneous; that the order dismissing the bill

of complaint should be reversed, and the temporary injunction which was dissolved by the court should be restored.

If the court shall take the view herein advocated, that it is, for the purposes of this case, immaterial whether the Rio Grande at Elephant Butte is navigable or not, provided the works of the defendants will injuriously affect navigation below, then the cause should be remanded for the purpose of trying the single issue made by the answer, as to whether or not the proposed works will injuriously affect navigation.

JOHN W. GRIGGS,
Attorney-General.

APPENDIX.

RIVER AND HARBOR BILL OF SEPTEMBER 19, 1890 (26
STATS., 454, SEC. 10).

That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court; the creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

RIVER AND HARBOR ACT OF JULY 13, 1892 (27 STAT., 110,
SEC. 3).

That section 7 of the river and harbor act of September nineteenth, eighteen hundred and ninety, be amended and reenacted so as to read as follows:

"SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of any port, roadstead, haven, harbor, harbor of refuge or enclosure, within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War:

"*Provided*, That this section shall not apply to any bridge, bridge draw, bridge piers and abutments, the construction of which has been heretofore duly authorized by law, or to be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works under an act of the legislature

of any State, over or in any stream, port, roadstead, haven, or harbor, or other navigable water not wholly within the limits of such State."

AN ACT GRANTING THE RIGHT OF WAY TO DITCH AND CANAL OWNERS OVER THE PUBLIC LANDS, AND FOR OTHER PURPOSES, APPROVED JULY 26, 1866 (14 STATS., 251, SEC. 9).

And be it further enacted, That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed: *Provided, however,* That whenever, after the passage of this act, any person or persons shall, in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

This section is now numbered 2339 of the Revised Statutes.

Articles 5 and 7 of the treaty between the United States and Mexico, of February 2, 1848, read as follows (9 Stat., 922):

ARTICLE 5. The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where

it has more than one, to the point where it strikes the southern boundary of New Mexico; thence westwardly along the southern boundary of New Mexico (which runs north of the town called *Paso*) to its western termination; thence northwardly along the western line of New Mexico until it intersects the first branch of the River Gila (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch and thence in a direct line to the same); thence down the middle of the said branch and of the said river until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

ARTICLE 7. The river Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels, or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both Governments.

The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits.

By the treaty between Mexico and the United States, known as the Gadsden treaty, of December 30, 1853 (10 Stat., 1034), the following modification of the treaty of 1848 was made :

The several provisions, stipulations, and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte below the initial of the said boundary provided in the first article of this treaty—that is to say, below the intersection of the $31^{\circ} 47' 30''$ parallel of latitude with the boundary line established by the late treaty, dividing said river from its mouth upward according to the fifth article of the treaty of Guadalupe.

Act of March 3, 1877 (19 Stats., 377 ; Sup., 2d ed., 137), an act providing for the sale of desert lands. In a proviso to the first section it is enacted :

The water of all lakes, rivers, and other sources of water supply upon the public lands, and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation.

A joint resolution of March 20, 1888 (25 Stat., 618), provides for the selection by the Geological Survey of reservoir sites for surplus water, and directs a report to be made upon the same to Congress.

In the sundry civil appropriation act of October 2, 1888 (25 Stat., 526), provision is made for the survey and reservation of reservoir sites in an appropriation of \$100,000 for that purpose.

In the sundry civil appropriation act of March 2, 1889 (25 Stat., 960), an appropriation of \$250,000 for the survey of reservoirs and canals was made.

The act of March 3, 1891 (26 Stat., 1101), sections 17, 18, 19, 20, and 21, provides a system of procedure for procuring right of way for reservoirs and canals.

The act of January 21, 1895 (28 Stat., 635), authorizes the use of public lands for reservoirs and canals, etc.

The act of January 13, 1897 (29 Stat., 484), provides for reservoirs on public lands by persons or corporations engaged in breeding stock, etc.

The act of February 26, 1897 (29 Stat., 599), is as follows:

AN ACT to provide for the use and occupation of reservoir sites reserved.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right of way act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or in part from reservoir sites used or occupied under the provisions of this act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or in part situate.

In the Supreme Court of the United States.

THE UNITED STATES, APPELLANT,	} No. 215.
<i>v.</i>	
THE RIO GRANDE DAM AND IRRIGATION Company et al., appellee.	

REPLY TO BRIEF FOR APPELLEE.

I.

The clause at the end of article 7 of the treaty of Guadalupe Hidalgo in these words: "the specifications contained in the present article shall not impair the territorial rights of either Republic within its own established limits," is irrelevant.

The obvious purpose of this was to affirm what would probably have been held to be the effect of the treaty without positive affirmation; that although navigation was to be common to the citizens of the two Republics, yet that the territorial rights of each should go to the middle of the river, following the deepest channel, as provided in article 5, thus designating the river, not as common territory for the exercise of sovereign rights, but merely as

common territory for purposes of navigation by citizens of the two Republics.

This clause certainly could not be strained so as to negative the right which each nation had to insist that no act should be done by one or the other which should impair the navigation of the river.

The inhibition of the treaty is against any work that may impede or interrupt, in whole or in part, the exercise of the right of common navigation.

Nothing in the language of the treaty confines the prohibited works to points on the river where it is navigable.

II.

Article 5 of the convention of March 1, 1889, quoted on page 12 of the brief for the appellee, is also irrelevant.

The article provides that whenever the local authorities on any point of the frontier between the United States of America and the Republic of Mexico in that portion in which the Rio Grande and Colorado form the boundary between the two countries shall think that works are being constructed in either of those rivers contrary to the former treaties they shall so notify their respective commissioners, etc.

It will be observed that the effect of this is to give the right of notification to the local authorities on any point of the frontier in that portion in which the Rio Grande and Colorado rivers form the boundary between the two countries. This clause defines what local authorities may complain.

The next clause defines what they may complain of, namely, that works are being constructed in either of

those rivers such as are prohibited by the treaties. This latter clause does not specify that the works complained of shall be within the parts of the river which are navigable.

III.

Counsel makes the point that the amended bill of complaint does not sufficiently allege the navigability of the river at Elephant Butte. He says (brief, p. 21): "There is a vast difference between a navigable river and one susceptible of navigation."

On this subject, I refer counsel and the court to the language of the Supreme Court in the case of *The Daniel Ball v. The United States*, quoted by counsel in his brief on page 29, as follows:

Those rivers must be regarded as also navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or susceptible of being used in their ordinary condition as highways for commerce.

Undoubtedly the pleader had this very language in mind when he drew the bill of complaint.

What the pleader evidently was trying to state was that although the river had not, as a matter of fact, been navigated all the way up to La Joya, yet it was capable or susceptible of navigation.

The mere fact that a large river, with ample water to transport vessels, lies in an unsettled or uninhabited territory and has, as a matter of fact, never been so navigated, does not justify a claim that it is not a navigable river.

IV.

Counsel for appellee contends in his fifth point that the right to construct the proposed works had become vested.

There can be no vested right to commit a public wrong. The contention of the Government is that none of the acts or proceedings set up by the defendant authorized them to injure the navigation of the river by diverting the whole current.

V.

There seems to be some discrepancy in the record as to exactly what was intended to be heard by the court below and upon what sort of a motion it was brought up.

On page 57 of the record is a motion on behalf of the plaintiff to set down the joint and several pleas for argument as to their sufficiency as a defense to the suit as a matter of law. By the order of continuance, printed on page 118 of the record, it is stated as follows: "This cause coming on to be heard upon the order to show cause why the temporary injunction heretofore granted herein should not be continued in force and respondent's motion to dissolve said injunction heretofore filed." Then follow various continuances on pages 119, 120, and 121.

The final order is printed on page 122. It recites that this cause coming on to be heard under the rule heretofore made upon the defendant to show cause why the injunction heretofore granted should not be continued, and the complainant having filed an amended bill, etc., and the defendant having filed a special plea in bar, and

having also answered said amended bill, and also filed a motion to dissolve the injunction and to dismiss the original and amended bills, and the complainant having filed its motion to set down defendants' pleas for argument as to their sufficiency as defense to said suit as a matter of law, and the court having heard the arguments of counsel, and having read the affidavits, extracts from geological reports, etc., and being fully advised thereby, *doth take judicial notice of the fact and doth thereby determine that the Rio Grande River is not navigable within the Territory of New Mexico, and doth find, as a matter of law, that said amended bill does not state a cause entitling the complainant to the relief prayed for in the prayer of said amended bill, and that the same is without equity, etc.* Thereupon the court ordered that the injunction be dissolved and the cause be dismissed.

VI.

Counsel for appellee refers to the case of *The Montello* (11 Wall., 411) as indicating that in questions of doubt as to the navigability of a stream the court will resort to public records, etc., to determine the question.

A reading of the case discloses that exactly the reverse is true, because in that case the court reversed the order of the court below dismissing the libel, and ordered that the case be remanded and that the allegations and proofs be made to conform to the facts, so as to present the question as to whether Fox River was a navigable stream of the United States.

VII.

The act of July 13, 1892 (see original brief of appellant, p. 58), confers upon the Secretary of War jurisdiction to approve dams in navigable waters.

If the object of the defendants is to use freshet waters for impounding purposes in such a manner as not to deplete the supply of water in the river below for the purposes of navigation, and their plans are consistent with such a purpose, they ought to submit them to the Secretary of War and receive his approval. They ought not to be allowed to proceed and build their dam against the direct allegation of the United States that they will, by the scheme of works which they contemplate, deplete and destroy the navigable capacity of the river.

VIII.

Counsel for the defendants in his argument asserted that the prosecution of this suit was a subterfuge, and that it was not desired to protect navigation but to preserve the waters of the river for a rival irrigation scheme.

This is emphatically denied. The suit was brought by the Attorney-General at the original request of Mr. Olney while Secretary of State, and for the precise purpose that the bill declares. The imputation of bad faith to the Government, or to any department of it, in a matter of this kind ought not to be entertained by the court.

JOHN W. GRIGGS,
Attorney-General.

Brief for the Appellee
Department of the United States

Presented to the Court

Filed Oct 31, 1898.

THE UNITED STATES,

Appellant,

vs.

THE RIO GRANDE DAM AND
IRRIGATION COMPANY AND
THE RIO GRANDE IRRIGATION
AND LAND COMPANY, Limited.

No. 315.

BRIEF FOR APPELLEE.

J. H. MCGOWAN,

Attorney for Appellee.

WASHINGTON, D. C.:

CASON BROS., PRINTERS AND BOOKBINDERS.

1898.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1898.

THE UNITED STATES,
APPELLANT,

v.

THE RIO GRANDE DAM AND IRRIGATION COMPANY ET AL.

} *No. 215.*

BRIEF FOR APPELLEE.

STATEMENT.

This case is here on appeal from the Supreme Court of the Territory of New Mexico. It was commenced by bill of complaint filed on behalf of the United States in the Third Judicial District of said Territory, to restrain the defendant corporation, The Rio Grande Dam and Irrigation Co., from constructing a dam and establishing a reservoir with canals, ditches, etc., for the purposes of irrigation, at Elephant Butte, a point on the Rio Grande about 125 miles north of El Paso, Texas. The bill declares the river to be navigable at certain points below El Paso, and that above El Paso, to and beyond the site of the

proposed dam, it carried such quantity of water, "and by reason of the conformation of the bed and banks, and the channel thereof, makes navigation of such last-mentioned portion of said river a feasible accomplishment;" and that the proposed dam would "materially affect the navigability of said Rio Grande, and impair navigation and commerce throughout its entire course from said proposed dam at Elephant Butte to the Gulf of Mexico;" further declared that the dam was not "affirmatively authorized by law," and was without the permission and approval of the Secretary of War, and was, therefore, a proposed violation of Section 10 of the act of Congress of September 19, 1890, and of Section 3 of the act of July 13, 1892, and hence prayed for an injunction.

Subsequently, the complainant filed an amended bill making the Rio Grande Irrigation and Land Company, Limited, an additional defendant.

The material allegations of this amended bill are that the river is navigable for steamboats from its mouth to Roma, about 350 miles; "and is susceptible of navigation and has been navigated above Roma to a point about 150 miles below El Paso, in the State of Texas," where the alleged navigation is said to be interrupted by falls and rapids, but above these obstructions it is declared that it is "susceptible of navigation up to La Joya, in the Territory of New Mexico, about 100 miles above Elephant Butte, where defendants propose to construct said dam; and said complainant further alleges that the said river between said rapids and said town of La Joya has, at different times, been used for the purposes of floating and transporting rafts, logs, and poles, and that the said portion of said stream is susceptible of being used and navigated for commercial purposes. And

complainant further alleges that the said river is navigable and susceptible of being navigated as aforesaid, for carrying on commerce between the Territory of New Mexico, the State of Texas, and the Republic of Mexico."

The amended bill also alleges that the proposed dam has not been affirmatively authorized by law, nor received the sanction of the Secretary of War, and that the navigability of the river at El Paso has been recognized by Congress.

Also, that the construction of the proposed dam would be in violation of the treaty relations existing between the United States and the Republic of Mexico.

To these complaints the defendants filed a joint plea and a joint answer. The plea alleges that the site of the proposed dam is wholly within the Territory of New Mexico, and within the arid region thereof; that in pursuance of various acts of Congress the Secretary of the Interior and the officers of the Geological Survey located and segregated from the public domain a reservoir site called "No. 38," on the river just above Elephant Butte, and another site called "No. 39," just below that point, and that subsequently, in pursuance of another act of Congress, these, and all other reservoir sites located under the acts of Congress, were thrown open to corporate and private entry, and the defendant, The Rio Grande Dam and Irrigation Co., had duly applied to enter the two sites so numbered "38" and "39"; that the defendant, The Rio Grande Dam and Irrigation Co., was duly organized under the laws of New Mexico, and had complied with the same in reference to the construction of dams and reservoirs, and the diversion of waters of the public streams of said Territory, and have duly filed proof of its organization as a corporation, and its maps of survey of its proposed reservoir and canals, with the Secretary of

the Interior, and secured his approval thereof in accordance with the laws of the United States; and defendants asked that the various reports of the Geological Survey of the United States, and of the Secretary of the Interior, showing the survey of the Rio Grande, together with the various maps accompanying the same, and copy of the approved maps of the reservoir and canals at Elephant Butte, might be made a part of the plea.

The defendants in their answer to the bill of complaint admit their incorporation as alleged, and their purpose to construct a dam and reservoir at Elephant Butte, "but in so far as that portion of said bill is concerned, which charges that the Rio Grande Irrigation and Land Company, Limited, is seeking to obtain control of the entire flow of said Rio Grande, and to divert and use the same, these defendants state that the entire flow of the Rio Grande during the irrigation season at the point or points where these defendants are seeking to construct reservoirs upon the same has long since been diverted, and is now owned and beneficially used by parties other than these defendants, in which diversion and appropriation of said waters these defendants, have no property rights, and that neither one of the defendants are seeking or have ever sought to appropriate or divert by means or structures above referred to, or contemplated diversion by means thereof, of any of the waters of said Rio Grande usually flowing in the bed thereof, during the time when the same are usually put to beneficial use by those who have heretofore diverted the same, but, on the contrary, these defendants state that it has been their intention and their sole intention, by means of the structures which they contemplate, and which are complained of in said bill, to store, control, divert and use only such of the waters of said stream as are not legally diverted, appropriated, used

and owned by others, and that these defendants have contemplated and now contemplate that any beneficial rights by them acquired in such stream by virtue of such structures will be very largely only so acquired to the excess, storm, and flood waters thereof, now unappropriated, useless, and which go to waste."

The defendants deny that the river is susceptible of navigation or has been navigated above Roma, in the State of Texas, or "has at any times in the past been used beneficially for the purpose of floating or transporting rafts, logs or poles, or that any portion of said stream in said Territory of New Mexico is susceptible of being used and navigated for commercial purposes, and deny that the said river is navigable, or susceptible of being navigated for the purpose of carrying on commerce between the Territory of New Mexico and the State of Texas and the Republic of Mexico; they deny that their contemplated use of the waters of the river would deplete the flow of the water through the channel of the same so as to seriously obstruct the navigability of the same at any point below the proposed dam; deny that they are proposing to construct the dam and reservoir without due authority of law; deny that the navigability of the river at El Paso has been recognized by Congress, and deny the allegation that the contemplated dam and reservoir would be a violation of our treaties with Mexico.

To the plea and answer the plaintiff filed a general replication. The court thereupon issued a temporary injunction, and the defendants moved to dissolve the same, whereupon the court made an order for hearing to determine whether the injunction should be made permanent or dissolved.

It was conceded by the attorneys for both parties that

the court could take judicial notice of the character of the river as to whether the same was navigable or not. But for the enlightenment of the court on this point, counsel for both sides submitted a great mass of documentary information, consisting of maps, reports of exploring and surveying expeditions made by the War and Interior Departments, also reports of officers specially detailed to investigate the feasibility of utilizing the river for navigation, and its capabilities for reservoirs and irrigation. (Op. of Court, Rec. 128.)

After a full hearing, consuming several consecutive days, the court ordered the injunction dissolved and the petition dismissed. (Order and Opinion, Rec. 124 *et seq.*) From this decree the plaintiff appealed to the Supreme Court of the Territory, where it was affirmed, and the case was then brought here.

Points in the Case.

There are six principal points in the case, which I shall state in the order in which I shall present them in argument.

1. Would the proposed dam and reservoir, if constructed, have been obnoxious to the requirements of the treaty of Guadalupe Hidalgo and subsequent treaties and conventions between the United States and the Republic of Mexico, or to international law?

2. Are the waters of the Rio Grande at or near Elephant Butte navigable waters of the United States in contemplation of the tenth section of the Act of Congress of September 17, 1890 (26 Stat. 454), or of the third section of the Act of July 13, 1892 (27 Stat. 110)?

3. If the river is not navigable at Elephant Butte, or within the boundaries of the Territory of New Mexico,

would the proposed dam and reservoir still be inhibited by said statutes from the fact, as alleged, that it is navigable for a short distance at or near its mouth ?

4. Congress never had any jurisdiction over the non-navigable waters of the United States save as the same was incident to riparian rights attaching to public lands, and all such rights have been subordinated to the local laws and customs of the States and Territories.

5. The right to construct the proposed dam and reservoir had become vested in the defendants and could not be disturbed by this proceeding.

6. If the court should find an apparent conflict between the laws of the United States conferring jurisdiction upon the States and Territories over non-navigable waters, and those charging the Secretary of War with the protection of navigable waters, the construction, if possible, should be such as to continue in full force and effect those acts looking to the redemption and development of the arid regions of our country.

I.

Would our Treaties, or International Law, be Violated ?

The Attorney-General quotes the 5th and 7th Articles of the Treaty of Guadalupe Hidalgo, and part of the 4th Article of the Gadsden Treaty, as bearing upon the point, but fails to reach any conclusion further than to raise the question whether our obligations under these would not require us to prohibit the works contemplated by the defendants.

There is nothing in the articles mentioned, nor in any other treaty or convention, that would warrant the contention of the Government in this regard. It is a fact that

this suit had its inception in similar claims asserted by the Government of Mexico through Minister Romero, on behalf of Mexican citizens residing on the right bank of the river below El Paso, and in his note addressed to the Secretary of State, Mr. Romero cited the articles mentioned by the Attorney-General, and in addition called attention to the requirements of Article 3 of the Convention of November 12, 1884, and of Article 5 of the Convention of March 1, 1889.

For the purposes of convenient consideration, I print here every article or clause bearing upon the matter in any treaty or convention between the two countries, including those cited by the Attorney-General and the Mexican authorities.

Treaty Guadalupe Hidalgo.

ART. 5. The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called Paso) to its western termination; thence, northward, along the western line of New Mexico, until it intersects the first branch of the River Gila; (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same;) thence down the middle of the said branch and of the

said river, until it empties into the Rio Colorado; thence across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

ART. 7. The River Gila, and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico, being, agreeably to the fifth article, divided in the middle between the two republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right; not even for the purpose of favoring new methods of navigation. Nor shall any tax or contribution, under any denomination or title, be levied upon vessels, or persons navigating the same, or upon merchandise or effects transported thereon, except in the case of landing upon one of their shores. If, for the purpose of making the said rivers navigable, or for maintaining them in such state, it should be necessary or advantageous to establish any tax or contribution, this shall not be done without the consent of both governments.

The stipulations contained in the present article shall not impair the territorial rights of either republic within its established limits.

9 Stat. 928, 929.

Gadsden Treaty.

ART. 4.—(Last clause.)

The several provisions, stipulations, and restrictions contained in the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio

Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty; that is to say, below the intersection of the 31 degree 47' 30" parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upwards, according to the fifth article of the treaty of Guadalupe.

10 Stat. 1034.

Convention of November 12, 1884.

ART. 3. No artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the Treaty when there is more than one channel, or by cutting water ways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the aforesaid Commissions in 1852, or as determined by Article 1 hereof, and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current of the river shall not be deemed an artificial change.

24 Stat. 1012.

Convention of March 1, 1889.

ART. 1. All differences or questions that may arise on that portion of the frontier between the United States of America and the United States of Mexico where the Rio Grande and the Colorado Rivers form the boundary line, whether such differences or questions grow out of alterations or changes in the bed of the aforesaid Rio Grande and that of the aforesaid Colorado River, or of

works that may be constructed in said rivers, or of any other cause affecting the boundary line, shall be submitted for examination and decision to an International Boundary Commission, which shall have exclusive jurisdiction in the case of said differences or questions.

ART. 5. Whenever the local authorities on any point of the frontier between the United States of America and the United States of Mexico, in that portion in which the Rio Grande and the Colorado River form the boundary between the two countries, shall think that works are being constructed in either of those rivers, such as are prohibited by Article 3 of the convention of November 12, 1884, or by Article 7 of the treaty of Guadalupe Hidalgo of February 2, 1848, they shall so notify their respective Commissioners, in order that the latter may at once submit the matter to the International Boundary Commission, and that said Commission may proceed, in accordance with the provisions of the foregoing article, to examine the case, and that it may decide whether the work is among the number of those which are permitted or of those which are prohibited by the stipulations of those treaties.

The Commission may provisionally suspend the construction of the works in question pending the investigation of the matter, and if it shall fail to agree on this point, the works shall be suspended, at the instance of one of the two Governments.

26 Stat. 1513, 1514.

None of these treaty provisions deal with the Rio Grande except where it forms the boundary between the two countries. To avoid all possible doubt on this point, the last clause of Art. 7 of the Guadalupe treaty expressly provides that the stipulations contained therein should "not impair the territorial rights of either republic within

its established limits." Clearly, the obstructions inhibited were only those that might be built into the stream below the south line of New Mexico. "The navigation * * * of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries; and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right" of navigation. Then immediately the right of each party is reserved to exercise complete control over that portion of the river or any of its branches or tributaries lying within its own territory.

Art. 4 of the Gadsden Treaty again declares, in substance, that the mutual contracts between the two countries in this regard relate only to the river below the south boundary of New Mexico. And the understanding of the two countries as to what part of the river was referred to in the treaty of Guadalupe where it inhibits works that would obstruct navigation, is clearly defined in Art. 3 of the Convention of Nov. 12, 1884, *supra*. There the high contracting parties are certainly considering that part of the river that forms the dividing line between the two countries. They declare that no artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel, under the Treaty (of Guadalupe), &c., shall be permitted, &c.

A similar construction is given by Arts. 1 and 5 of the Convention of March 1, 1889, *supra*. That given in Art. 5 cannot be mistaken.

ART. 5. "Whenever the local authorities on any point of the frontier between the United States of America and the United States of Mexico, in that portion in which the

Rio Grande and the Colorado River form the boundary between the two countries, shall think that works are being constructed, in either of those rivers, such as are prohibited by Article 3 of the Convention of November 12, 1884, or by Article 7 of the Treaty of Guadalupe Hidalgo of February 2, 1848, they shall so notify their respective Commissioners," &c.

It seems quite clear, and even beyond the bounds of controversy, that these treaties and conventions can have no reference or application to obstructions, or proposed obstructions, in that part of the river that lies wholly within the territory of either party. The Attorney-General, after quoting portions of the treaties for some purpose, which is not wholly clear, seems, in a negative kind of way, to admit that they do not inhibit any use we may choose to make of the waters of the river within our own boundaries, and finally rests his argument on this point on the ground of "natural right." But in this connection we appeal from the present Attorney-General to his predecessor.

Requirements of International Law.

The whole question involved in the point now under discussion, was submitted by the Secretary of State to the Attorney-General by letter of November 5, 1895. This letter carried with it the written contention of the Mexican minister, and also suggested the inquiry whether "by the principles of international law, independent of any special treaty or convention, may Mexico rightfully claim that the obstructions and diversions of the waters of the Rio Grande in the Mexican minister's note referred to, are violations of its rights," etc. The Attorney-General replied in an elaborate opinion (21 Op. Atty.-Genls.

274; See Appendix), in which he holds "that taking the water for irrigation from the Rio Grande above the point where it ceases to be entirely within the United States and becomes the boundary between the United States and Mexico is not prohibited by the treaty." He also held that "the rules, principles, and precedents of international law impose no duty or obligation upon the United States of denying to its inhabitants the use of the water of that part of the Rio Grande lying entirely within the United States, although such results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States." The whole opinion will be found in the Appendix.

The record discloses the fact that all agriculture in the valley of the Rio Grande in New Mexico depends upon the use of the waters of that river. That is a fact of which this court will also take judicial notice. The whole valley mentioned lies within the arid regions where there is not enough rain fall to produce crops. It has been cultivated solely by irrigation for more than two hundred years, as appears historically. The remains of ancient ditches indicate extensive irrigation by the natives in prehistoric times. The Mexican authorities well knew this when we acquired the territory. They knew that the use of these waters was absolutely necessary to sustain the life of the people. In arid countries where people exist, the water bears the same relation to them as does air and light. They cannot live without it. And in this valley when it was acquired from Mexico there were local laws and customs regulating the use of the streams and other sources of water supply. Rights in the use of the waters of the river had long since vested in the Mexican citizens found there. They owned their ditches (acequias) and the right to fill them. They also had the right to

construct other ditches without limit, except the limit of the water in the stream. Article 8 of the treaty (of Guadalupe) specially provided for the protection of the property rights, of all kinds, of the people found in the ceded territory. It is also clear from the record that the water found in the natural flow of the Rio Grande through New Mexico is insufficient for cultivating all the tillable soil. Under these facts it would be a curious application of the principles of international law, or the comity of nations, or the doctrine of natural rights, to deprive our own citizens of the means of life that it might be bestowed upon the citizens of another country. There is no authority which directly or indirectly requires this. The loose and somewhat vague rules asserted by authors as governing the *navigation* of international rivers, where they are navigable in both jurisdictions, have no application here. No authority has been found that holds that the proprietary country may not make any use of the stream within its own territory that was necessary to maintain the comfort or life of its inhabitants. If this be not true, then the lower country would have control of the lives and property of the upper country. But "the fundamental principle of international law is the absolute sovereignty of every nation as against all others within its own territory."

If then our treaties with Mexico put us under no obligations to furnish it with water which is gathered wholly on our own soil, for its use, either for navigation or agriculture, certainly no law of nations or law of right calls upon us for such a sacrifice. Humanity, common sense, national self preservation, all cry out against it.

II.

Are the waters of the Rio Grande at or near Elephant Butte navigable waters of the United States in contempla-

tion of the 10th section of the act of September 17, 1890 (26 Stat. 454), or the 3d section of the act of July 13, 1892 (27 Stat. 110)?

The district judge before whom the case was originally tried decided this point in these words: "The Rio Grande is not a navigable river in New Mexico." (Rec. 134.) This judgment was reached after counsel on both sides had conceded that the court could take judicial notice of what were navigable rivers, and after there had been submitted to him for his enlightenment a great mass of documentary information in the shape of maps, reports of exploring and surveying expeditions made under the War and Interior Departments of the Government, and also reports of officers specially detailed to investigate the feasibility of utilizing the river for navigation, and its capabilities for reservoirs and irrigation. (Rec. 128.) The court also had before it the affidavits of a number of living witnesses who were familiar with the stream, and had been for many years, and who, with one or two exceptions, testified that it was not navigable for any useful purpose. Most of them express astonishment that the question could be seriously raised. The point at which defendants propose to build the dam is within the judicial district of the judge who rendered the decision. In fact, a large part of the river within the Territory lies in that district. It is to be presumed that he had personal knowledge of the stream, its characteristics and possibilities. And after having his knowledge reinforced and enlightened by the maps, reports, etc., he characterized the stream as follows:

"The course of the Rio Grande in New Mexico is through rocky cañons and sandy valleys; in the valleys it spreads out, shallow and between low banks; over fine,

light, sandy soil of great depth; bars are continually forming, passing away and reforming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from four to fifty-two feet to the mile and the changes in its course are rapid, continual, and often radical; the valley is scarred with low ravines made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise, and these were of timbers; one of these instances occurred in 1858 or 1859, when a raft was sent down from Canutillo to El Paso, a distance of 12 miles; and the other recently, when some telegraph poles were floated from La Joya a 'short distance.' 'The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand, and in times of low water the stream divided into a number of minor channels; and apparently a large percentage of the water is lost in these great deposits of fine material.' (12 Annual Rept. Geol. Sur. 204.) 'From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during the few weeks of the year and a small stream during the remainder of it.' (10 Annual Rept. Geol. Sur. p. 99.) 'From personal observation, I know that these seasons of flood and drouth (in Rio Grande) were of about the same character 30 years ago.' (Maj. Anson Mills, 10 U. S. Cav. Rept. Spec. Com. Sen., Vols. 3 and 4, p. 39.) But what is of more importance, we have reports of officials upon the exploration of the river made under the direction of the Government for the special purpose of considering its navigability. From these it appears: 'The stream is not now navigable, and it cannot be made so by open channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks and the small discharge, do not encourage the belief that such improvement would be financially,

even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. In my judgment the stream is not worthy of improvement by the General Government.' (Report of O. H. Ernst, Major of Engineers, to Secretary of War, 1889.) Again: 'I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. During the greater part of the year when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow channel with locks, the construction of which on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable.' (Report of Gerald Bagnall, Assistant Engineer, to Secretary of War, 1889). Rec. 129, 130, 131.

The Supreme Court of the Territory in its unanimous opinion, announced by its Chief Justice, after examining the question of the navigability of the river, makes the following declaration :

"It is perfectly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse in any manner whatever, and that it is not now capable of being so used. On the other hand, it has been, from the earliest times of which we have any knowledge, used as a source of water for irrigation. Its valley has always been the centre of population in New Mexico. It was the first portion of this region to be occupied and settled by civilized men, and the population of this valley has always been, and is now, absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops. Dams have been erected and maintained at El Paso for nearly two hundred years, by which the river has been

obstructed and its waters diverted for irrigation to both sides of the Rio Grande. But never until the present time, so far as we can ascertain, has any question been raised by any one as to interference with any use of the river for purposes of navigation." (Rec., p. 5 of Opinion of Sup. Court.)

Thus the two lower courts, whose territorial jurisdiction covers the whole of that portion of the Rio Grande located in New Mexico (a distance of 700 miles), have found, as a question of fact, that it is not navigable above El Paso. How far this finding is binding upon this court, I shall not stop to argue. I note, however, that the finding was by the consent of both parties. But if the fact thus found should not be considered *conclusive*, it at least will, I am sure, be given great weight. The three Supreme Court judges who joined in the opinion live in New Mexico. Judge Bantz, the district judge (who is now dead), had lived in the Territory for many years. They were all better qualified to pass upon the question upon their own notice than a stranger who was unfamiliar with the history of the river and the situation on the ground. And in each case their individual knowledge and observations were supplemented by official reports of actual surveys and measurements. It is difficult to conceive how such a fact could be more completely and conclusively found.

I am aware that the Attorney-General, as "Point 5" of his brief, has declared that the court erred in holding that the Rio Grande River is not a navigable stream above El Paso. But his argument here rests upon two points, both of which it seems to us, with due deference, are fallacious. First, it is alleged, in substance, that the bill of complaint declared the river navigable from a point above Elephant Butte to its mouth; that by the pleadings issue was joined upon this question of fact; but "that this issue was not

tried, the court taking judicial notice of a disputed fact, decided it on a motion upon which the truth of all complainant's allegations of fact was, by the rule of pleading and procedure, admitted." Second, it is urged that the disputed fact of navigability in this case was of such character that the court could not determine it by taking judicial notice.

As to the first position, it is error to say that "the bill of complaint alleges, as a matter of fact, the navigability of the river from a point above Elephant Butte to its mouth." The only clause that approaches such an allegation is section 6 of the amended bill. (Rec. 18.)

"6. The complainant further alleges that said river is navigable and has been navigated by steamboats up to the town of Roma, in the State of Texas, about three hundred and fifty miles from its mouth, and is susceptible of navigation and has been navigated above Roma to a point about one hundred and fifty miles below El Paso, in the State of Texas. The complainant further alleges that the navigability of said river is interfered with at the last-mentioned point by some falls or rapids, and that the said river above said falls or rapids is susceptible of navigation up to La Joya, in the Territory of New Mexico, about one hundred miles above Elephant Butte, where defendants propose to construct said dam; and said complainant further alleges that the said river between said rapids and said town of La Joya has at different times been used for the purposes of floating and transporting rafts, logs, and poles, and that the said portion of said stream is susceptible of being used and navigated for commercial purposes. And the complainant further alleges that the said river is navigable and susceptible of being navigated as aforesaid for carrying on commerce between the Territory of New Mexico, the State of Texas, and the Republic of Mexico."

By a careful reading of this clause, it will be seen that

it does not bear the construction given it by the learned counsel. The first part of the clause alleges definitely that the river is navigable from its mouth to Roma. Above Roma to "some falls," which are 150 miles below El Paso, the allegation is, that the river "is susceptible of navigation and has been navigated." From the latter point to La Joya, 100 miles above Elephant Butte, the allegation is that the river "is *susceptible* of navigation," and "has at different times been used for the purposes of floating and transporting rafts, logs and poles, and that the said portion of said stream is *susceptible* of being *used* and *navigated* for *commercial purposes*." "And complainant further alleges that the said river is navigable and susceptible of being navigated *as aforesaid* for carrying on commerce between the Territory of New Mexico, the State of Texas, and the Republic of Mexico."

Clearly the allegations are that the river is navigable to Roma; was at one time navigated above that to "some falls," and is *susceptible* of being navigated over this section again; and while it has never been navigated above "some falls" to La Joya, yet it is susceptible of being navigated over this section for commercial purposes.

That is, the pleader laid out the river, for his purposes, in three sections, the first of which he declares to be navigable; the second, once navigable and could be made so again, the third never was navigable but is susceptible of being made so.

There is a vast difference between a navigable river and one *susceptible* of navigation. The pleader knew this. Where the river is navigable he said so. He knew where it was not navigable and took good care not to say it *was* navigable at such places. A thing is *susceptible* when it is capable of having something added to it. A man is susceptible of a headache when he is quite free from it;

a body is susceptible of being made white when it is perfectly black. It is just possible that by the expenditure of millions the Rio Grande could be made navigable over the stretches described; although one of the Government engineers who surveyed the river in New Mexico under special directions to determine its navigability, declares that in his belief it would be both financially and physically impossible to make it navigable. (Report of Maj. O. H. Ernst, quoted in Rec. 130.) But the question is, does the bill of complaint declare the river navigable in New Mexico? It clearly does not, and the District Attorney who drew it did not intend to make the allegation. He knew of the dam at El Paso, 200 years old; and of all the other facts found by the District and Supreme Courts which make it impossible to truthfully allege navigability. And no proper interpretation can be given his language touching this point other than he meant to say that the river above El Paso could, by sufficient expenditure of money and labor, be made navigable. In fact, the two bills of complaint, properly interpreted, are an admission that this part of the river is not now navigable, and never was navigable, except that at some time in the past tense it "had been used for the purposes of floating and transporting rafts, logs and poles," but carefully adds in the same sentence, and immediately following: "and that the said portion of said stream is *susceptible* of being used and navigated *for commercial purposes*."

The amended bill was made and sworn to by the U. S. District Attorney, Mr. Childers. In his affidavit he gives his own interpretation of the allegations of the bill concerning the navigability of the river above the "some falls" point. After stating positively that the river is navigable "for a considerable distance above its mouth," the affidavit proceeds: "Affiant further states that he has

been reliably informed and believes that said river has been used above said point ["some falls"] in the past for the purpose of floating logs down the stream to the city of El Paso, and that he is informed and believes that said river has been recently so used for floating telegraph poles for a short distance a little below the town of La Joya." (Rec. 22.) Mr. Childers also filed in the case, and apparently at the same time he filed the amended bill, the affidavit of Anson Mills, a Government engineer on special duty as Mexican Boundary Commissioner, and who deposes that forty years ago he was engaged as an engineer and surveyor in the vicinity of El Paso, and "that in 1858 he, with a party, constructed and floated a raft of logs from a point known as El Canutillo, above El Paso, Texas (a distance of 12 miles), down to El Paso, for building purposes, and that he is informed and believes that the same has been done by many other parties about that time, the names of whom he is now unable to remember; and that recently a party constructing the Postal Telegraph Company's line used the river's current for floating their telegraph poles down the river at a point near La Joya, New Mexico."

The information, then, that the pleader had touching the navigability of the stream above El Paso, was that forty years ago a raft was floated from a point twelve miles above El Paso down to that town—of course, stopping above the old dam—and that "recently" some telegraph poles were floated a short distance near La Joya. Col. Mills' affidavit is dated the 23d of June, and "recently" would be about the time of the spring floods. The poles were probably floated the "short distance" by aid of the flood waters.

These two affidavits clearly indicate what Mr. Childers meant in the sixth clause of his bill when he sums it up

in the last sentence by saying "that the said river is navigable and susceptible of being navigated *as aforesaid*." That is, it was navigable where he had theretofore said it was navigable, and was susceptible of being made navigable in other portions. Hence, whatever may be the effect of the technical rule of pleading and procedure evoked by the Attorney-General, there has been no admission thereby of navigability in New Mexico, because it is not alleged.

But in addition to this the record shows that by the plea and answer the question of navigability was put in issue, and the case was actually heard on that issue. The method of finding that fact can cut no figure. The court journal (Rec. 118) states that the case was heard upon the order to show cause why the temporary injunction should not be continued in force, and upon respondent's motion to dissolve the same.

The motion to dissolve the injunction and dismiss the bill was made upon the filing of the plea and answer, and practically as part of the same. (Rec. 156.) The issue was, by complainant's replication, fully joined on bill and answer, and it was, as a matter of fact, upon this joinder that the case went to hearing, the only important question being the navigability of the river in New Mexico; and this question was tried out in one of the legitimate ways of trying such questions, and the fact having been found adverse to the allegations of the bill the decree properly followed.

Judicial Notice.

The second point made by the Attorney-General under this head was that the court could not determine navigability by taking judicial notice. It occurs to me that this contention is fully met by the decision of this court in *United States v. Steamer Montello* (11 Wall. 411; Bk. 20

L. Ed. 191). Mr. Justice Field, in announcing the opinion of the court, uses this language :

"We are supposed to know judicially the principal features of the geography of our country, and, as part of of it, what streams are public navigable waters of the United States. Since this case was presented we have examined with some care such geographies and histories of Wisconsin as we could obtain from the Library of Congress, to ascertain, if possible, the real character of Fox River, and to render the fiction of the law, as to our supposed knowledge of the navigable streams in that State, a reality in this case ; but from such examination we are still in doubt whether Fox River has any such connection with other waters as to form with them a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

When this case of the *Montello* came here a second time (87 U. S. 430 ; Bk. 22 L. Ed. 391), the court again, upon its own motion, took notice of the character of the Fox River, quoting in its opinion Parkman's Discovery of the Great West, Bancroft's History of the United States, and Smith's History of Wisconsin.

In *U. S. v. Lawton* (5 How. 10 ; Bk. 12 L. Ed. 27) the court says : "A river which is one of the principal objects in the geography of a country may be judicially noticed."

In *Peyraux v. Howard* (7 Pet. 324 ; Bk. 8 L. Ed. 700) : "This court takes judicial notice of the fact that the tide ebbs and flows at New Orleans."

In *Hilliker v. Coleman*, the Supreme Court of Michigan (41 N. W. 219) held : "The court can take judicial notice that the natural water-courses in the State have all decreased in volume, and many of them been dried up by the cultivation and clearing of the country."

"Judicial notice may be taken by Massachusetts courts that the Connecticut River, above the dam at Holyoke, doet not, either by itself or by uniting with other water, constitute a public highway over which commerce may be carried on with other States or with foreign countries." (*Commonwealth v. King*, 5 L. R. A. 536 ; 150 Mass. 221.)

Further see: (*Olive v. State*, 86 Ala. 88 ; *Ross v. Faust*, 54 Ind. 471 ; *Thurman v. Morrison*, 14 B. Mon. (Ky.) 296 ; and *Lands v. A Cargo of Coal*, 4 Fed. Rep. 478).

These authorities fix the rule. The courts in this country may take judicial notice to determine for themselves whether a stream, or other water, is navigable or non-navigable, and may examine geographies, histories, reports, maps, &c., to ascertain, if possible, the real character of such waters, "and to render the fiction of the law * * a reality."

The question then recurs, whether, the courts of the vicinage, having the best opportunity and facilities for doing so, and having found the fact, the appellate court should not allow such finding to stand. As this case is here on appeal of course the whole record is before the court for review, but both parties having voluntarily submitted this question of fact to the lower court should in equity be held to abide by the finding.

But should the court determine to examine into the fact of the navigability of the Rio Grande at Elephant Butte, or within the boundaries of the Territory of New Mexico as contemplated by the Statutes of the United States, we confidently appeal to the abundance of information on that point.

The statutes invoked are as follows :

Act of 1890.

SECTION. 10. That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any obstruction, except bridges, piers, docks and wharves, and similar structures erected for business puposes, whether heretofore or hereafter created, shall constitute an offense, and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

26 Stat. 454.

Act of 1892.

SEC. 3. That Section 7 of the River and Harbor Act of September nineteen, eighteen hundred and ninety, be amended and re-enacted so as to read as follows :

"SEC. 7. That it shall not be lawful to build any wharf, pier, dolphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor line, or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said waters; and it shall not be lawful hereafter to commence the construction of any bridge, bridge draw, bridge piers and abutments, causeway, or other works over or in any port, road, roadstead, haven, harbor, navigable river or navigable waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge or other works have been submitted to and approved by the Secretary of War, or to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless approved and authorized by the Secretary of War.

"*Provided*: That this section shall not apply to any bridge, bridge draw, bridge piers and abutments the construction of which has been heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, draw bridge, bridge piers and abutments or other works under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable waters not wholly within the limits of such State."

27 Stat. 110.

These statutes only profess to deal with "the navigable waters of the United States," or the navigable waters "in respect of which the United States has jurisdiction." Unless the Rio Grande at Elephant Butte can be held as *such waters*, then the decree below should be confirmed.

The non-navigable waters of the United States, and the navigable waters that belong wholly to the individual States, are not included in these enactments.

This court has left no room for reasonable doubt as to what are navigable waters of the United States over which the United States may have jurisdiction. In *The Daniel Ball v. United States* (77 U. S. 557; Bk. 19 L. Ed. 1001), the court says:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water."

This definition is quoted and approved by the Court in *United States v. The Montello* (87 U. S. 430; Bk. 22 L. Ed. 391). Justice Davis, who rendered the opinion in that case, also quotes with approval the words of Chief Justice Shaw in *Rowe v. Bridge Co.* (21 Pick. 344), as follows: "It is not, however, every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable; but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." And after some further discussion Justice Davis adds: "The vital and essential point is whether

the *natural navigation* of the river is such that it affords a channel for *useful commerce*."

It is clear from the definition given in *The Daniel Ball*, that rivers over which the United States has jurisdiction under the federal laws must: 1st. Be navigable in fact; 2nd. Must be used, or be susceptible of being used in their ordinary condition, as highways for commerce, and this commerce must be such as is conducted in the customary modes of trade and travel on water; 3d. They must form in their ordinary condition, by themselves, or by uniting with other waters, a continued highway over which such commerce is or may be carried on with other States or foreign countries in the *customary modes* in which commerce is conducted by water. That is, they must be navigable waters crossing some State or international line.

The learned Justice, with his usual lucidity of statement, has left nothing to conjecture.

No stream which comes roaring down its course for a few weeks each year, although it should carry at such times sufficient water to float an ocean-going steamer, but is non-navigable in its *ordinary condition*, will fit into the definition.

No stream which is capable only of carrying a few poles or logs at certain seasons will answer.

It must bear upon its waters, or be capable of so doing, trade and commerce conducted in the customary modes of trade and travel on water.

It must be a river whose navigable waters are not wholly inside of any one State.

It must by itself, and in its ordinary condition, or by uniting with other waters, form a continued highway, for just such commerce as is described, between our own States, or between our country and some foreign country.

It is not a river or stream that simply *carries water to a navigable river*. It must of itself be navigable in fact.

It is not a river or stream that cannot *now* be navigated, but might possibly be made navigable by enormous expenditure. It must be capable of useful commerce in *its ordinary condition*.

This is the sense also in which the bulk of our courts in this country define navigability :

"A fresh-water stream having the requisite volume of water only occasionally as the result of freshets, and for brief periods, is unnavigable and private property." *Morrison v. Coleman*, 87 Ala. 655.

"Waters of a river which can be used by vessels only for the transportation of persons and property between different places in the same State are not within the maritime jurisdiction of the United States." *Com. v. King*, 150 Mass. 221.

"To make a stream navigable, there must be some commerce and navigation upon it which is essentially valuable." *Woodman v. Pitman*, 79 Me. 456, and authorities there cited.

"A fresh-water stream above tidewater is not public and navigable where it has never been utilized for transportation except for saw-logs and lumber at occasional periods during freshets in the spring or winter, and its depth does not fit it for such transportation for any considerable part of the year, and it is not shown to be exempt from the public surveys of the government as a public stream, or declared to be such by the State legislature." *Bayzer v. McMillan Mill Co.* (Ala.), 16 So. 923.

"A waterway lying wholly within a State, and not connected with other waters leading to the sea, is not navigable, under the laws of the United States." *Hodges v. Williams*, 95 N. C. 331.

"Where the entire portion of a navigable river is included within a single State, the part so enclosed is undoubtedly the property of such State." 1 Halleck Int. Law (by Baker), 146. *Horton's International Law*, vol.

1, par. 30, foot page 97. Also see—*Goodwill v. Bosier Parish, &c.*, 38 La. An. 752; *Heyward v. Farmers Min. Co. (S. C.)*, 19 S. E. 963; *Fulmer v. Williams*, 122 Pa. 191; *State v. Narrows Island Club*, 100 N. C. 477.

The act of Congress of September 19, 1890, prohibiting obstructions in navigable waters, and the act of July 13, 1892, making it unlawful to build dams, &c., in navigable waters without the permission of the Secretary of War, both relate solely to the character of navigable waters as defined in *The Daniel Ball*. It is true that neither of these statutes had been enacted when *The Daniel Ball* case was decided. But Congress had theretofore enacted many laws to regulate commerce and transportation on the navigable waters of the United States. It was for the enforcement of the act of July 7, 1838 (5 Stat. 304), as amended by the act of August 30, 1852 (10 Stat. 61), that the suit was brought against *The Ball*. Those statutes provided for the license and inspection of vessels engaged in trade "upon the bays, lakes, rivers, or other navigable waters of the United States." The issue turned upon the question: What are the navigable waters of the United States? The answer given by this court fixed the law in this regard. The laws of 1890 and 1892 were made with reference to that definition. The statutes under consideration in *The Ball* case use the phrase, "navigable waters of the United States," the act of 1890 "navigable capacity of any waters in respect of which the United States has jurisdiction," and the act of 1892 repeats the phrase of 1838 and 1852, "any navigable waters of the United States."

It is safe then to assume that the law as to what are navigable waters of the United States is found in *The Daniel Ball* and subsequent decisions.

The record clearly discloses that there are no such

waters in the Rio Grande in New Mexico, or for many hundred miles below El Paso. So far as this question of facts rests on proofs presented to the lower court by the complainant, it is all summed up in the following:

1. The small steamer "Bessie" is now plying with difficulty between the mouth of the river and Camargo, a distance of 250 miles, Camargo being 1,175 miles below Elephant Butte.

2. That in "former years" there was steam navigation of some kind as far up as Roma—a distance of 300 miles.

3. That, in 1852 to 1855, Major Emory carried some small boats "to a point about 100 miles above the mouth of Devils River," say 600 miles below Elephant Butte.

4. That at some date not mentioned, Capt. Love reported that he had "carried a small boat up the river to within 150 miles below El Paso." [But this, in the opinion of Col. Mills, is a mistake, and the statement should be, one hundred and fifty miles below Presidio del Norte, which is about 400 miles below El Paso, and 525 miles below Elephant Butte.]

5. That, in 1858, a raft of logs was floated from El Canutillo to El Paso—12 miles.

6. That recently some telegraph poles were floated a short distance near La Joya. (Rec., pp. 59 and 60.)

Thus throughout the whole stretch of the river from the northern boundary of New Mexico to Camargo, a distance of 1,750 miles, there has only been a single attempt in 40 years to use its waters for navigation; and this consisted in floating some telegraph poles (no one knows how many), a short distance (no one knows how far.)

To set over against this there appears in the record proofs tending to show the following:

1. That the bed of the river, outside the cañons, is such as to preclude navigation—there not being sufficient water in the ordinary stage, and during the floods it spreads out, forms bars, changes channel, &c.

2. The fall is from four to fifty-two feet to the mile, and the changes in its course are rapid, continual, and often radical.

3. That the Director of the Geological Survey (12 An. Rpt. 204) alleges that "The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand, and in times of low water the stream divides into a number of minor channels; and, apparently, a large percentage of the water is lost in these great deposits of fine material." Again, in 10 An. Rpt. 99,—“From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year, and a small stream during the remainder of it.”

4. Colonel Mills, on whose statement the whole case for the Government rests, also says, in speaking of the condition of the river, as the same is described by Major Powell, of the Geological Survey:

“From personal observation, I know that these seasons of flood and drouth were of about the same character 30 years ago.”

And in his letter to the Secretary of State of January 7, 1897, in alluding to the fact that he had in 1859 (1858) floated a raft from El Canutillo down to El Paso, he says:

“By reason, however, of the depletion of the water, it would now hardly be practicable to do so.”

5. Major O. H. Ernst, an engineer of the War Depart-

ment, explored the river in 1888, 1889, under directions to ascertain its navigability, and reported as follows :

"The stream is not now navigable, and it cannot be made so by open channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks and the small discharge, do not encourage the belief that such improvement would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. In my judgment the stream is not worthy of improvement by the General Government."

6. Asst. Engineer Gerald Bagnall reported to the Secretary of War in 1889:

"I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. * * * During the greater part of the year, when the river is low, the discharge would be insufficient to supply any navigable channel except perhaps a narrow canal with locks, the construction of which, on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable."

7. There is a dam across the stream at El Paso that has stood for 200 years. (Rec. p. 5, Op. Sup. Ct. N. M.)

8. The sworn statements of nine citizens of New Mexico, all of whom testify that they are acquainted with the character of the river, their acquaintance covering periods varying from 17 to 49 years and averaging over 30 years. Two of these witnesses are surveyors and civil engineers,

one having been employed as engineer by the Government since 1880. They each declare that the river in New Mexico has not at any time during his acquaintance been navigable or navigated, so far as he knows, for any purpose.

Mr. Gillett, who has been intimately acquainted with the Rio Grande at El Paso and points above for 49 years, declares that from 1849 to 1862 or 1863, while he lived at El Paso, the stream at that point was the same in all its essential features that it is now; that practically during each year from 1849 to 1862 the river at El Paso was dry, and when not dry there would be a small amount of water passing—"possibly only two feet deep and from thirty to fifty yards wide." That there was an old Mexican dam just above El Paso, "which would have absolutely cut off all navigation," and that the dam had been there "from the time whereof the memory of man runneth not to the contrary;" that if Col. Mills floated a raft down from El Canutillo in 1858, it must have been during the high-water period, and the logs were "nothing more than small cotton-wood polls, because that was the only kind of timber that ever has been grown near said place."

Mr. Watts has known the river in New Mexico for 34 years. He says he is able to state from his thorough knowledge of the stream, "that neither trees nor raft nor boats have ever been floated by the people for pleasure or commerce in New Mexico upon its waters, except that some lone instance may have occurred where for a short distance the same could have been floated, or in some unusual flood some venturesome person may have undertaken to go down the same in a boat; that affiant has heard of such instances, but never heard of one except where the party thus attempting to navigate the stream

came to grief; that it is practically now in the same condition that it was when he first became acquainted with it in 1864."

Dr. Kennon has known the river intimately for 45 years; that its general characteristics now are the same as in 1853; "that the same is not and never has been a navigable stream in New Mexico, or capable or susceptible of being navigated; that it has never been beneficially used by the people in New Mexico for commercial purposes, and is incapable of such beneficial use by reason of its rapids, its quicksands, sand bars, shifting banks, and lack of water."

James Brent has known the river for 17 years and entirely corroborates Dr. Kennon, saying, among other things: "Affiant further says that even in its highest floods it would be impossible for a boat to navigate the same; that there is no timber along its banks which can be floated thereon."

Mr. Hudson, a former volunteer officer of the army, has been acquainted with the river since 1863 (35 years), and declares in substance that the only beneficial use that has been made of its waters is for agricultural purposes, adding: "It is incapable of being used for beneficially floating logs on account of the sand bars in its channel and the difficulty of keeping such logs in the water—even if there was any timber along its banks, which affiant states there is not at any point within the Territory of New Mexico, and that if anybody ever floated rafts in the same, such rafts must have been comprised of small cottonwood trees, or small underbrush, and must have been inspired with the desire of achieving the impossible, than to accomplish any beneficial purpose."

John D. Ball shows that he has been particularly familiar with the stream in New Mexico for 30 years,

and declares "that it is not capable in its natural condition of being put to any beneficial uses as a highway for commerce or for pleasure; that even during its flood times he never has known it to be navigated or put to any useful purpose, and in his opinion it is, even at such periods, incapable of being navigated."

James T. Reed is a surveyor and civil engineer, who for 18 years has been engaged in making surveys for the United States and for private persons, and is acquainted with the river from Fort Quitman, seventy-five miles below El Paso, up to Albuquerque. He declares it unnavigable and incapable of being navigated, and that during his acquaintance it has not been navigated between the two points mentioned. In 1880 he traveled from Fort Quitman to El Paso, and between the former place and Fort Rice he had to dig in the bed of the stream to get water for himself and his animals.

Ricard L. Powell is another surveyor who has been employed by the United States since 1880, and acquainted with the Rio Grande during that time. His work has given him peculiar advantages to thoroughly know the river. He fully corroborates the others, and declares "that such a thing as a steamboat or raft ascending or descending its channel in New Mexico during flood season is impossible, and would be considered absurd by any of the people living along its course."

John M. Ginn for 28 years has been familiar with the river in its entire course in the Territory:

In its general character and condition it is the same today as when he first became acquainted with it, that it is a dangerous, treacherous, sand bar, quicksand stream, never has been navigated or capable of navigation during the period affiant has known it, and has, during such entire time, been incapable of navigation, that he has

drank the waters of the River, has been swallowed up in its quicksands, and has for years gazed at its ugly and tortuous current and been impressed with its ugliness and utter uselessness except for purposes of irrigation; affiant further says that even in its highest floods it is incapable of navigation, and that if as stated in the affidavit of Brigadier-General Mills in this case steamboats could ascend for a hundred miles above El Paso, that verily, in the opinion of this affiant, they could only do so by the aid of wings.

9. The reports of the Director of the Geological Survey show the stream valueless, except for irrigating the arid soil.

10. The Secretary of the Interior, in pursuance of acts of Congress, designated a number of reservoir sites for purposes of irrigation on the river in New Mexico, one being located immediately above Elephant Butte and another below that point, either of which, if constructed, would probably require as much water from the river as the reservoir contemplated by the defendants, and neither of which can be supplied in any way without damming the river.

The river within New Mexico not being in fact navigable as contemplated by sec. 10 of the act of 1890, or sec. 7 of the act of 1892, we proceed to our third inquiry.

III.

If the river is not navigable at Elephant Butte or within the boundaries of the Territory, would the proposed dam and reservoir still be inhibited by said statutes from the supposed fact that it is navigable for a short distance at or near its mouth?

It is exceedingly doubtful whether the waters, carried

by the river in its course above El Paso, contribute now, or ever did contribute, to the navigable capacity of the stream from its mouth to Camargo or to Roma. The 700 miles of the river lying between the north and south boundary lines of New Mexico are almost wholly through sandy, arid soil. The evaporation and seepage are great. The evaporation from a pond is said to be $6\frac{1}{2}$ feet off the surface in a year. It is pretty clear, at least, that only the storm or flood water gets into the stream below El Paso. At that point, outside the flood season, the water is very low or the bed of the stream entirely dry, and there is an ancient dam entirely across it. So that for purposes of navigation it is plain that the stream in New Mexico, in its ordinary condition, contributes nothing, or an extremely small amount, to the waters below El Paso.

This leaves only the flood waters to be considered. Now, such flood waters as pass the dam at El Paso, during the few days they are pouring down the river, have 1,000 miles to flow before they reach Roma, the extreme upper point to which steam navigation ever reached, and which point is now 50 miles above the most strenuous efforts of the little *Bessie*. I cannot believe that the court will find, either upon its own notice, or from anything in the record, that *any* of the waters of the river gathered upon the Territory above El Paso contribute to the navigable capacity of the river where it may be navigable. And there is reason for the gravest doubt whether the Rio Grande is navigable at any point from source to mouth, within the definition in *The Daniel Ball* case.

But even if it should be found navigable in the ordinary method for useful commerce for a short distance below Roma, and it should be conceded, for the purposes of the argument, that the waters in New Mexico contribute to its navigability, yet we contend earnestly that these things do

not give the Secretary of War jurisdiction over the non-navigable portion of the stream, and that an obstruction of the water where it is not navigable is not prohibited by the statutes. The obstructions prohibited are those built or to be built "in any navigable waters," &c., or in waters "in respect of which the United States has jurisdiction." Now, this court says explicitly that that kind of water must be navigable in fact. "To build in," must mean *to build into*. The construction sought by the Attorney-General would practically give the Secretary of War jurisdiction over every creek and stream and pond in the United States, as they all connect, sooner or later, with waters that are navigable.

Again, the act of 1890, on which the complainants more particularly rely, only assumes to prohibit obstructions "not affirmatively authorized by law." Our contention is that the dam we proposed to erect was explicitly authorized by law, and is to be placed in waters in respect of which the United States has no jurisdiction whatever.

IV.

Congress never had any jurisdiction over the non-navigable waters of the United States save as the same was incident to riparian rights attaching to public lands, and all such rights have been subordinated to the local laws and customs of the States and Territories.

As early as 1866, an act was passed entitled, An act granting the right of way to ditch and canal owners over the public lands, and for other purposes, section 9 of which is now Sec. 2339 of the Revised Statutes, and reads as follows :

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufactur-

ing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (See 14 Stat. 252).

In 1870 Congress amended the whole act (16 Stat. 217) and added a clause which now forms Sec. 2340 of the Revised Statutes, as follows:

SEC. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

Thus the question of the use of the non-navigable waters of the country was settled by legislation more than thirty years before the enactment of the statute placing the navigable waters, for certain purposes, under control of the Secretary of War.

The common law relating to riparian rights was not applicable to the condition of things found in the Western States and Territories, and the miners and those using the water of the streams for irrigation established the rule of *prior appropriation*, which came to be adopted by the local courts, and subsequently (1866) approved by Congress.

This court has given construction to that act in *Atchi-*

son v. Peterson (20 Wal. 507, Bk. 22 L. Ed. 414), and in *Basey v. Gallagher*, (20 Wal. 670, Bk. 22 L. Ed. 452). In the latter case the controversy related to the use, for the purposes of irrigation, of the waters of Avalanche Creek, near its junction with the Missouri River. See also *Jennison v. Kirk*, 98 U. S. 453, Bk. 25 L. Ed. 240, and *Brader v. Notoma Water, &c., Co.*, 101 U. S. 274, Bk. 25 L. Ed. 790. In this latter case Justice Field, delivering the opinion of the court, said :

"We are of opinion that it is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect before the passage of the act of 1866, and that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

After Congress had adopted the local laws and customs relating to the use of water for mining and agricultural purposes, it proceeded to enact a number of other laws intended to encourage the use of these waters to the fullest extent in redeeming the vast arid regions of the West.

Desert Land Laws.

In 1877 (19 Stat. 277, *Sup.* 2d ed., 137) is found an act entitled, An act to provide for the sale of desert lands in certain States and Territories. The proviso of the first section reads as follows :

"*Provided, however, that the right to the use of the water by the person so conducting the same on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights.*"

This act is made specifically applicable to California, Oregon, Washington, Idaho, Montana, Utah, Wyoming, Arizona, *New Mexico*, and Dakota. Afterwards (1891) made applicable to Colorado.

March 20, 1888 (25 Stat. 618), Congress passed a joint resolution directing the Secretary of the Interior, by means of the Director of the Geological Survey, to investigate the practicability of constructing reservoirs for the storage of water in the arid region of the United States, and to report to Congress.

October 2, 1888 (25 Stat. 526), Congress provided for the survey and selection of sites for reservoirs necessary for irrigation and the segregation of such sites and the irrigable lands about them, and appropriated \$100,000 for the purpose.

March 2, 1889 (25 Stat. 960), a further appropriation of \$250,000 was made for the same purpose.

August 30, 1890 (26 Stat. 391), Congress repealed the act of Oct. 2, 1888, so far as it provided for reserving the irrigable lands about the selected reservoir sites, but continued the reservation of the selected sites.

March 3, 1891 (26 Stat. 1101), in an act entitled, An act

to repeal timber culture laws, &c., in sections 17, 18, 19, 20 and 21, was provided a system of procedure to procure the right of way for reservoirs and canals for purposes of irrigation.

Section 18 reads as follows :

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof ; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch : *Provided*, That no right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, *and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.*

February 26, 1897 (29 Stat. 599), all reserved reservoir sites were thrown open to occupation by individuals and States under the provisions of the act of March 3, 1891.

January 21, 1895 (28 Stat. 635), an act authorizing the use of public lands for reservoirs and canals to the extent they may be occupied and for fifty additional feet on each side.

January 13, 1897 (29 Stat. 484), an act was passed entitled, An act providing for the location and purchase of

public lands for reservoir sites. This act specially provides for the acquisition of such sites by persons or corporations engaged in breeding stock, etc.

August 18, 1894 (28 Stat. 422), Congress provided for making over to certain States and Territories portions of the desert lands on conditions of reclaiming same by irrigation.

In addition to these statutes providing for the irrigation of arid lands generally, there has grown up under several enactments of Congress a most extended system of irrigation on the various Indian reservations. Large sums of money have been appropriated for the construction "of dams, canals, ditches, and laterals for the purposes of irrigation," etc. (26 Stat. 1040; 27 Stat. 627; *Ib.* 631; and 28 Stat. 900).

After the passage of the act of March 3, 1891, granting the right of way through the public lands and reservations of the United States for the use of canals, ditches, and reservoirs, upon the filing and approval of the certificates and maps as therein set forth, the Secretary of the Interior established and published regulations for the execution of the law. On page 8 of these regulations (1884) he uses the following language:

"This act is evidently designed to encourage the much needed work of constructing ditches, canals, and reservoirs in the arid portion of the country by granting a right of way over the public lands necessary to the maintenance and use of the same.

"The eighteenth section of the act in question provides that—

"'The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.'

"The control of the flow and use of the water is there-

fore a matter exclusively under State or Territorial control, the matter of administration within the jurisdiction of this Department being limited to the approval of maps carrying the right of way over the public lands.

"In submitting maps for approval under this act, however, which in anywise appropriate natural sources of water supply, such as the damming of rivers or the appropriation of lakes, such maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which the same is located."

V.

The right to construct the proposed irrigation plant, including the dam, had become vested.

There can be no misunderstanding as to what Congress meant by the system of laws relating to the disposition of desert lands and their cultivation by use of the water in the adjacent streams. Under these enactments, and the laws of New Mexico, the defendant, the Rio Grande Dam and Irrigation Co., acquired the right to construct its dam and reservoir at Elephant Butte. The construction was "affirmatively authorized by law."

A portion of the laws of the Territory relating to the acquisition and use of water for irrigation I have printed in the Appendix. It is a fact, of which the court will take notice, that the valley of the Rio Grande has always been cultivated solely by means of water diverted from the river. When the United States acquired the Territory the existing laws were continued in force, and these laws of the Mexican Republic, as they related to the use of water, were distinctly based upon the rule of prior appropriation. One of the first enactments of the Territorial legislature (see Appendix) provided that "no inhabitant of

said Territory shall have the right to construct any property to the impediment of irrigation of lands or fields, such as mills, or any other property that may obstruct the source of the water, *as the irrigation of the fields should be preferable to all others.*"

And the act of 1886, providing for the formation of corporations for the purpose of supplying water for irrigation, authorizes such corporations "to take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons," &c.

There is no question but what we have conformed to the laws of New Mexico, and under such laws, so far as they may control, are entitled to proceed with the construction of the dam and reservoir. Neither is it questioned that in securing the approval of the Secretary of the Interior to our articles of incorporation and our maps of location, we have complied with the laws of the United States in that regard.

Under this definite statutory authorization the defendants commenced to construct, and at the time they were enjoined had expended \$150,000 in construction and expenses incident to construction.

VI.

If from any POSSIBLE construction of the acts 1890 and 1892, giving the Secretary of War certain control over the navigable waters of the United States, they could be held in conflict with the statutes placing the control of the non-navigable waters in the States and Territories, the construction we contend for should be given, and the irrigation laws held intact.

Enormous interests have grown up under these latter enactments. The census of 1890 shows that eight years

ago there were over 54,000 persons engaged in irrigation, and 3,564,416 acres were thus under cultivation. The average product per acre per annum was \$14.89, giving a total of \$53,074,000.

Practically every gallon of water utilized to produce this result was taken from a stream or lake that connected with navigable waters. It is not unlikely that since 1890 the area cultivated and the income from it have both doubled.

In New Mexico, at the time of the last census, there were 3,085 persons employed in irrigation, cultivating 91,745 acres, the average product per acre being valued at \$12.80.

The census returns the average value of irrigated lands as \$83.28 per acre. This would give the value of the lands in the United States in 1890, which had been redeemed from utter worthlessness by irrigation, as \$295,846,528, and the value of such lands in New Mexico as \$7,614,955.

Not losing sight of the fact that there have been eight years of active development in this line since these figures were made, the court will have some conception of the great value of the present interest in irrigation. And the lands actually redeemed are only a fraction of those that may be cultivated if the use of water remains unlimited.

The Director of the Geological Survey, in his Tenth Annual Report (1888-'89), Part 2, has this to say :

"The area of the arid regions is about 1,300,000 square miles—one-third of the entire country. I judge that of this area there can be economically reclaimed, by irrigation, within the present generation, at least 150,000 square miles—an empire one-half as large as the entire area now cultivated in the United States. Irrigated, this land would be worth not less than \$30 an acre, adding \$2,880,000,000 to the wealth of the nation."

The Director states that under the authority of Congress he had during the years 1888, 1889 mapped out an area for reservoirs in New Mexico, equal to 6,370 square miles, and had actually surveyed and segregated 3,800 square miles, and that the total segregations of irrigable lands in the Rio Grande Valley at that time was 5,760,000 acres; and that the total number of acres segregated in the U. S. by the Government was 30,555,120.

Thus it is seen that one-sixth of the whole area set apart at that time by the Government for irrigation was in the valley of the Rio Grande.

On page 4 *Ib.* the Director says: "The region in which agriculture depends on irrigation includes about four-tenths ($\frac{4}{10}$) of the entire area of the United States, not including Alaska." "At the present time the greater number of the small streams are utilized for irrigation, so far as possible, without the storage of water; that is to say, the ordinary flow of water of the smaller streams during the season of growing crops is diverted by canals from the natural channels and served to the land. The future development of irrigation chiefly depends: First, on the utilization of the larger streams. These have heretofore been largely unused from the fact that great capital or extensive co-operative industry is required. Second, on the construction of storage basins. In most portions of the United States the season of growing crops is short compared with the entire year, and the greater part of the irrigation works heretofore constructed utilize the water only through the growing season, and the extra-seasonal water is allowed to run to waste. Third, on the construction of storm water reservoirs. Throughout the irrigable area of the arid region there are great numbers of catchment basins through which no perennial waters flow, but within which the storm waters may be gathered

and stored in reservoirs, to be utilized in the season of growing crops. Fourth, on controlling the entire flow of the smaller streams through the irrigating season. A portion of these waters now runs to waste."

The contention of the Attorney-General endangers this whole vast interest. If the Secretary of War may have injunction to stop the construction of a dam in a non-navigable stream, he may have every existing obstruction in such waters removed. If our dam is obnoxious to Sec. 10 and Sec. 7 of the Statutes, as alleged in the bill, then the hundreds of dams in Colorado across this same stream are equally obnoxious; all the irrigating plants in Montana and Wyoming and California are illegal and subject to being destroyed.

All this raises a question of which this Court has not been unmindful in somewhat similar cases. In *Escanaba Trans. Co. v. Chicago* (107 U. S. 678, Bk. 27 L. Ed. 442), the controversy related to bridges and bridge-piers constructed over and into the confessedly navigable waters of the Chicago River. This Court discussed the relative value to the public of having unobstructed passage across the bridges and having unobstructed navigation on the river, and announced that "the object of wise legislation is to give facilities to both, with the least obstruction to either."

In *Gilman v. Philadelphia* (70 U. S. 713, Bk. 18 L. Ed. 96), a similar view was taken, the Court declaring that it should not be forgotten that the commerce which passes over a bridge may be much greater than that conducted on the river. The river in this case also at the point of obstruction was navigable. The Court simply considered and found a way to protect the greater interest.

In the case at bar, admitting every claim made for the

river, its navigability and commerce, it all sinks into utter insignificance in comparison with the interest that would be destroyed at Elephant Butte alone, to say nothing of the menace to all irrigation.

Certainly the construction of the acts of 1890, 1892, for which we contend, is a possible construction. It would, then, seem to be the province of the court to protect the citizens of our own country in the property which they have acquired under the encouragement of Congressional enactment and executive construction.

Conclusion.

In conclusion, I beg to call the attention of the court to the evidence in the record that this suit is not prosecuted for the purpose of protecting the navigability of the river. It is evidently an attempt to break down one irrigation scheme that another may be built up. A huge dam is to be constructed at El Paso for impounding all the waters of the river, making what is termed an "international reservoir." This for the benefit largely of the citizens of Mexico. This suit, in its inception, is a subterfuge to accomplish an entirely different purpose from that apparent on the face of the proceedings. For this I believe the Department of Justice is nowise responsible. But the facts are now patent on the face of the record (pp. 105 to 116); they have been commented on by the court below, and we feel warranted in raising the suggestion that the courts should not be used for such a purpose.

J. H. MCGOWAN,
Atty. for Defendants.

J. H. McGowan
Atty. for Defendants

APPENDIX.

LAWS OF NEW MEXICO RELATING TO IRRIGATION.

ACT 20, JULY, 1851.

Compiled Laws of 1865, page 18.

SEC. 2. No inhabitant of said Territory shall have the right to construct any property to the impediment of irrigation of lands or fields, such as mills, or any other property that may obstruct the source of the water, as the irrigation of the fields should be preferable to all others :

GENERAL LAWS OF NEW MEXICO, 1880.

Chap. 1, "Acequias."

SEC. 1. All the inhabitants of the Territory of New Mexico shall have the right to construct either private or common acequias, and to take the water for said acequias from wherever they can.

SESSION LAWS, 1886-7.

Chap. 12, pp. 29.

SEC. 1. Any five persons who may desire to form a corporation for the purpose of constructing and maintaining

reservoirs and canals, or ditches and pipe lines, for the purpose of supplying water, for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith ; for either or both of said objects, either jointly or separately shall make and sign articles of incorporation, which shall be acknowledged before the Secretary of the Territory, or some person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged, such articles shall be filed with such Secretary.

Sections 2, 3, and 4 prescribed the details of what the articles of incorporation shall contain, and the last clause of Section 4 reads as follows :

“ May purchase, acquire, hold, sell, mortgage and convey such real and personal estate as such corporation may require to successfully carry on and transact the objects for which it was formed.”

SEC. 17. Corporations formed under this act for the purpose of furnishing and supplying water for any of the purposes mentioned in Sec. 1 shall have, in addition to the power hereinbefore mentioned, rights as follows :

1. To cause such examinations and surveys for their proposed reservoirs, canals, pipe lines and ditches, to be made, as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by their officers, agents, and servants, to enter upon the lands or water of any person, or of this territory.

2. To take and hold such voluntary grant of real estate and other property as shall be made to them in furtherance of such corporation.

3. To construct their canals, pipe lines or ditches upon or along any stream of water.

4. To take and divert from any stream, lake, or spring, the surplus water, for the purpose of supplying the same to persons, to be used for the object mentioned in Sec. 1, of, this Act, but such corporation shall have no right to interfere with the rights of, or appropriate the property of any persons except upon the payment of the assessed value thereof, to be ascertained as in this act provided : *And provided further*, That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same when so diverted.

5. To furnish water for the purposes mentioned in Sec. 1, at such rates as the by-laws may prescribe ; but equal rates shall be conceded to each class of consumers.

6. To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said corporations.

SESSION LAWS 1891, P. 130.

Be it enacted by the Legislative Assembly of the Territory of New Mexico :

SECTION 1. That every person, association or corporation hereafter constructing or enlarging any ditch, canal or feeder, for any reservoir, and taking water from any natural stream, shall within ninety days after the commencement of such construction, change or enlargement, file and cause to be recorded in the office of Probate Clerk of the county in which such ditch, canal or feeder be situated, a sworn statement in writing, showing the name of such ditch, canal, or of the reservoir supplied by such feeder, the point at which the headgate thereof is

situated, the size of the ditch, canal or feeder, both in width and depth, the carrying capacity in inches, the description of the line thereof, the time when the work was commenced, the name or names of the owners thereof, together with a map showing the route thereof, the legal subdivisions of the land, if on surveyed lands, with proper corners and distances, and in case of an enlargement or change, the depth and width, also the carrying capacity of the ditch so enlarged or changed, and the increased capacity of the same thereby occasioned, and the time when such change or enlargement was commenced, and no priority of right for any purpose shall attach to any such construction, change or enlargement until such record is made.

SEC. 2. A copy of such sworn statement duly certified by the probate clerk of the county where such record is made shall be admitted as *prima facie* evidence of such appropriation of water in all the courts of this Territory : *Provided*, That the provisions of this act shall not affect any existing vested rights or any public acequia or ditch used for the public, and the canals, ditches or acequias authorized by this act to be constructed shall be completed within five years from the time work shall be commenced on the same.

SEC. 3. All acts and parts of acts in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage.

Approved February 26, 1891.

OPINION OF ATTORNEY-GENERAL.

21 Opinions, 274.

TREATY OF GUADALUPE HIDALGO—INTERNATIONAL LAW.

Article VII of the treaty of February 2, 1848, between Mexico and the United States, known as the treaty of Guadalupe Hidalgo, is still in force, so far as it affects the Rio Grande.

The taking of the water for irrigation from the Rio Grande above the point where it ceases to be entirely within the United States and becomes the boundary between the United States and Mexico, is not prohibited by said treaty.

Article VII is limited in terms to that of the Rio Grande lying below the southern boundary of New Mexico, and applies to such works alone as either party might construct on its own side.

The only right the treaty professed to create or protect with respect to the Rio Grande was that of navigation. Claims against the United States by Mexico for indemnity for injuries to agriculture alone, caused by scarcity of water resulting from irrigation ditches wholly within the United States at places far above the head of navigation, find no support in the treaty.

The rules, principles, and precedents of international law impose no duty or obligation upon the United States of denying to its inhabitants the use of the water of that part of the Rio Grande lying entirely within the United States, although such use results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States.

The fact that there is not enough water in the Rio Grande for the use of the inhabitants of both countries for irrigation purposes, does not give Mexico the right to subject the United States to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied, entirely within its own territory. The recognition of such a right is entirely inconsistent with the sovereignty of the United States over its national domain.

DEPARTMENT OF JUSTICE,
December 12, 1895.

SIR: I have the honor to acknowledge the receipt of your letter of the 5th ultimo in which you refer to the concurrent resolution of Congress passed April 29, 1890, providing for negotiations with the Government of Mexico with a view to the remedy of certain difficulties mentioned in the preamble to such resolution, which arise from the taking of water for irrigation from the Rio Grande above the point where it ceases to be entirely within the United States and becomes the boundary between the United States and Mexico. I have also the copy which you enclose of the note of the Mexican minister to yourself, dated October 21, 1895, in which he states at length the position taken by his Government.

You say: "The negotiations with which the President, acting through the Department of State, is charged by the foregoing resolution cannot be intelligently conducted unless the legal rights and obligations of the two Governments concerned and the responsibility of either, if any, for the disastrous state of things depicted in the Mexican minister's letter, are first ascertained.

"I have the honor, therefore, to call your attention to the legal propositions asserted in Mr. Romero's letter and

to inquire whether, in your judgment, those propositions correctly state the law applicable to the case—in other words: (1) Are the provisions of article 7 of the treaty of February 2, 1848, known as the treaty of Guadalupe Hidalgo, still in force so far as the river Rio Grande is concerned, either because never annulled or because recognized and reaffirmed by article 5 of the convention between the United States and Mexico of November 12, 1884? (2) By the principles of international law, may Mexico rightfully claim that the obstructions and diversions of the waters of the Rio Grande in the Mexican minister's note referred to, are violations of its rights which should not continue for the future and on account of which, so far as the past is concerned, Mexico should be awarded adequate indemnity?"

I reply as follows:

(1) Article VII of the treaty of Guadalupe Hidalgo, while it was declared to have been rendered nugatory for the most part by the first clause of Article IV of the treaty concluded December 30, 1853, and proclaimed June 30, 1854, was, by the second clause thereof, reaffirmed as to the Rio Grande (nom. Rio Bravo del Norte) below the point where, by the lines as fixed by the latter treaty, that river became the boundary between the two countries. Said Article VII is recognized as still in force by Article V of the convention concluded November 12, 1884, and proclaimed September 14, 1886.

So far, therefore, as it affects the subject now in hand, said Article VII, in my opinion, is still in force. I am unable, however, to agree with the minister in the interpretation which he gives it.

His statement is that the city of El Paso del Norte has existed for more than three hundred years, during almost all of which time its people have enjoyed the use of the

water of the Rio Grande for the irrigation of their lands. As that city and districts within its jurisdiction did not need more than 20 cubic meters of water per second, which was an almost infinitesimal portion of the volume of water even in times of severest drought, they had sufficient water for their crops until about ten years ago, when a great many trenches were dug in Colorado, especially in the St. Louis Valley and in New Mexico, through which the upper Rio Grande and its affluents flow, so greatly diminishing the water in the river at El Paso that, except when rains happen to be abundant, there is scarcity of water from the middle of June until March. In 1894 the river was entirely dry by June 15, so that no crops could be raised, and even fruit trees began to wither. The result has been to reduce the price of land and cause great hardships to the people, whose numbers in Paso del Norte, Zaragoza, Tres Jacales, Guadalupe, and San Ignacio diminished from 20,000 in 1875 to one-half that number in 1894.

The minister further states that from a report of the assistant quartermaster-general addressed to the General-in-Chief of the United States Army, dated September 5, 1850, it appears that Captain Lowe (meaning Love), U. S. A., ascended the river in a vessel to a point several kilometers above Paso del Norte, showing that it was then navigable at that place. The minister has been misinformed. The original report, which is now before me, shows that Captain Love was instructed to carry "to the highest attainable point in the Rio Grande" his small keel boat, which "drew with her crew, provisions, arms, etc., on board, 18 inches of water." He found this point at some "impassable falls," which he named "Brookes Falls." Carrying around them "the skiff which had accompanied his boat," he rowed 47 miles farther to other

falls, which he named "Babbitts Falls." "Beyond this point he found it impossible to proceed with the skiff either by land or water," and it was "about 150 miles by land below El Paso."

The minister contends that the irrigation ditches in Colorado and New Mexico, which result in diminishing the flow of water at El Paso, come within the treaty prohibitions of "any work that may impede or interrupt, in whole or in part, the exercise of this right" (of navigation), because, as he says, "nothing could impede it more absolutely than works which wholly turn aside the water of these rivers." But Article VII is limited in terms to "the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico." Article IV of the treaty of 1853 continues the provisions of said Article VII in force "only so far as regards the Rio Bravo del Norte below the initial of said boundary provided in the first article of this treaty." It is that part alone which is made free and common to the navigation of both countries, and to which the various prohibitions apply. It is plain that neither party could have had, in framing these restrictions, any such intention as that now suggested. The fact, if such it were, that the parties did not think of the possibility of such acts as those now complained of would not operate to restrain language sufficiently broad to include them, but the terms used in the treaty are not fairly capable of such a construction.

They naturally apply only to the part of the river with which the parties were dealing, and to such works alone as either party might construct on its own side if not restrained. Though equally divided in theory between the two nations where it is their boundary, the river is in fact a unit for purposes of navigation, and therefore the treaty required the consent of both for the construction of "any

work that may impede or interrupt" navigation, even though it should be "for the purpose of favoring new methods of navigation." (Art. VII.) Up to the head of navigation no such work could have been constructed save by one of the two Governments or by its authority. The prohibition was, therefore, appropriately made applicable to them alone, and not to the citizens of either—"neither shall, without the consent of the other, construct," etc. Above the head of navigation, where the river would be wholly within the United States, different rules would apply and private rights exist which the Government could not control or take away save by the exercise of the power of eminent domain, so that clear and explicit language would be required to impose upon the United States such obligations as would result from the construction of the treaty now suggested.

Moreover, the only right the treaty professed to create or protect with respect to the Rio Grande was that of navigation. The claim now made is for injuries to agriculture alone at places far above the head of navigation. Captain Love, in the report referred to, said: "The mouth of Devils River, which is about 100 miles below the mouth of the Puerco (Pecos) and 617 above Ringgold Barracks, is the head of steamboat navigation," and that "with some difficulty" navigation by keel boats was possible "to a point 56 miles above the 'Grand Indian Crossing,' or about 283 miles above the mouth of Devils River." So far as appears, the large and numerous tributaries below El Paso supply a sufficient volume of water for the needs of navigation.

In fact, the part of the treaty now under consideration merely expresses substantially the same rights and duties which international law would imply from the fixing of the middle of the river as the boundary, viz., free naviga-

tion of the entire stream below the point where it becomes common to both nations of any work which might impede or interrupt navigation without the consent of both.

In my opinion, therefore, the claim now made by Mexico finds no support in the treaty. On the contrary, the treaty affords an effective answer to the claim by the well-known rule that the expression of certain rights and obligations in an agreement implies the exclusion of all others with relation to the same subject.

It is not necessary in order to bring this principle into play that it shall appear that either party or both actually thought of the particular matter whose exclusion is asserted, although that fact, when it appears, may serve to emphasize the inference. I am not advised whether the subject of the use of the water of the Rio Grande for irrigation was mentioned during the negotiations or not, but it is stated that such use had long been made by the Mexicans, and it was known that agriculture could not be carried on in that region without it. It was known, too,—certainly to Mexico—that this necessity existed throughout the entire region watered by the upper Rio Grande and its tributaries, for, as a province of Spain and then as an independent nation, Mexico had included both New Mexico and Colorado, and from the independence of Texas, in 1836, down to the treaty of 1848, Mexico's eastern boundary was the Rio Grande to its source. By this treaty Mexico ceded to the United States the territory west of the Rio Grande and north of the southern boundary of New Mexico, just as she had abandoned to Texas all the territory east of that river, without any reservations, restrictions, or stipulations concerning the river except those above mentioned.

Settlements had long existed in the region of Santa Fe, and the probability of the ultimate settlement of the en-

tire territory along the Rio Grande must have been apparent to both parties. Yet the treaty made no attempt to create or reserve to Mexico or her citizens any rights, or to impose on the United States or their citizens any restraints with respect to the use of water for irrigation, although rights of property in the territory were secured to all Mexicans, whether established there or not. (Art. VIII).

The treaty of 1848 was a treaty of peace; and a different rule for the construction of such treaties is laid down by some writers. (Vattel, *Law of Nations*, Chitty's Ed., p. 433.) If it be suggested that the circumstances under which this treaty was made bring its terms, as against the United States, within the operation of such rule, it is a sufficient answer that, even if the existence of the rule be acknowledged, it simply subjects provisions in favor of the United States to strict construction; like all rules of construction, it has no application except in cases of doubtful meaning of language used, and can not be made the means of introducing new terms. Moreover, the United States paid \$15,000,000 for the territory acquired by the treaty (Art. XII), and by the treaty of 1853, which was not a treaty of peace, Mexico ceded further territory in consideration of \$10,000,000 (Art. III), repeating without enlarging the stipulations of the former treaty as to rights on the Rio Grande.

(2) I have given my opinion of the construction and effect of the treaty because it is responsive to your general request, though not to your specific questions. That opinion, perhaps, in strictness, makes it unnecessary for me to consider your second question, but as that question is not put alternatively or conditionally, I proceed.

An extended search affords no precedent or authority which has a direct bearing.

There have been disputes about rights of navigation of international rivers, but they have been settled by treaty. (For a list of such treaties see Heffter *Droit Int.*, Appendix VIII.) The subject is fully discussed by Hall (*Int. Law*, Sec. 39), who denies that the people on the upper part of a navigable river have a natural right to pass over it through foreign territory to its mouth. But if such right be conceded, no aid is afforded for the present inquiry, because use for navigation, being common, would not curtail use by the proprietary country, while in the case now presented, there not being enough water for irrigation in both countries, the question is, which shall yield to the other.

It is stated by some authors that an obligation rests upon every country to receive streams which naturally flow into it from other countries, and they refer to this as a natural international servitude. (Heffter *Droit Int.*, sec. 43; 1 Phillemore *Int. Law*, p. 303.) Others deny the existence of all international servitudes, apart from agreement in some form. (Letters of Grotius quoted, 2 Hert., p. 106; Klüber *Droit des Gens Moderne*, sec. 139; Bluntschii *Droit Int. Cod.*; Woolsey's *Int. Law*, sec. 58; 1 Calvo *Droit Int.*, sec. 556.)

Such a servitude, however, if its existence be conceded, would not cover the present case or afford any real analogy to it. The servient country may not obstruct the stream so as to cause the water to back up and overflow the territories of the other. The dominant country may not divert the course of the stream so as to throw it upon the territory of the other at a different place. (See authorities *supra*.) In either of such cases there would be a direct invasion and injury by one of the nations of the territory of the other. But when the use of water by the inhabitants of the upper country results in reducing the

volume which enters the other, it is a diminution of the servitude. The injury now complained of is a remote and indirect consequence of acts which operate as a deprivation by prior enjoyment. So it is evident that what is really contended for as a servitude which makes the lower country dominant and subjects the upper country to the burden of arresting its development and denying to its inhabitants the use of a provision which nature has supplied entirely within its own territory.

Such a consequence of the doctrine of international servitude is not within the language used by any writer with whose works I am familiar, and could not have been within the range of his thought without finding expression.

Both the common and the civil law undertake to regulate the use of the water of navigable streams by the different persons entitled to it. Neither has fixed any absolute rule, but leaves each case to be decided upon its own circumstances. But I need not enter upon a discussion of the rules and principles of either system in this regard, because both are municipal, and especially as they relate to real property, can have no operation beyond national boundaries. (Creasy Int. Law, p. 164.) So they can only settle rights of citizens of the same country *inter sese*. The question must, therefore, be determined by considerations different from those which would apply between individual citizens of either country. Even if such a question could arise as a private one between citizens of one country and those of another, it is not so presented here. The mere assertion of the claim by Mexico would make it a national one even if it were of a private nature. (Gray v. United States, 1 C. Cls. R. 391-392.) But the use of water complained of and the resulting injuries are general throughout extended regions, so that effects upon indi-

vidual rights cannot be traced to individual causes, and the claim is by one nation against the other in fact as well as form.

The fundamental principle of international law is the absolute sovereignty of every nation as against all others within its own territory. Of the nature and scope of sovereignty with respect to judicial jurisdiction, which is one of its elements, Chief Justice Marshall said (*Schooner Exchange v. McFaddon*, 7 Cranch, p. 136):

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an external source would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

"All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

It would be entirely useless to multiply authorities. So strongly is the principle of general and absolute sovereignty maintained that it has even been asserted by high authority that admitted international servitudes cease when they conflict with the necessities of the servient state. (Bluntschli, p. 212; see criticism by Creasy, p. 258.) Whether this be true or not, its assertion serves to emphasize the truth that self-preservation is one of the first laws of nations. No believer in the doctrine of natural servitudes has ever suggested one which would interfere with the enjoyment by a nation within its own territory of whatever was necessary to the development of its resources or the comfort of its people.

The immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is

entirely inconsistent with the sovereignty of the United States over its national domain. Apart from the sum demanded by way of indemnity for the past, the claim involves not only the arrest of further settlement and development of large regions of country, but the abandonment, in great measure at least, of what has already been accomplished.

It is well known that the clearing and settlement of a wooded country affects the flow of streams, making it not only less, but also subjecting it to more sudden fluctuations between the greater extremes, thereby exposing inhabitants on their banks to increase of the double danger of drought and flood. The principle now asserted might lead to consequences in other cases which need only be suggested.

It will be remembered that a large part of the territory in question was public domain of Mexico and was ceded as such to the United States, so that their proprietary as well as their sovereign rights are involved.

It is not suggested that the injuries complained of are or have been in any measure due to wantonness or wastefulness in the use of water, or to any design or intention to injure. The water is simply insufficient to supply the needs of the great stretch of arid country through which the river runs, never large, giving much and receiving little.

The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only, because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.

Very respectfully,

JUDSON HARMON.

The SECRETARY OF STATE.

OPINION OF THE DISTRICT COURT.

The issues briefly stated are these :

The amended bill charges that the defendant is (1) about to obstruct the Rio Grande, a navigable river, and (2) obstruct the flow of waters and interfere with the navigable capacity of a river. That such obstructions would be in violation of the Acts of Congress of 1890 and 1892, and contrary to the treaty with Mexico.

A preliminary injunction was granted, and the defendant ordered to show cause why it should not be continued. The defendant filed its answer denying that the Rio Grande is a navigable river ; and also filed special pleas justifying under right-of-way for reservoir and canals secured under the Acts of 1891, and certain Territorial laws.

The issues arise on the motion to dissolve the injunction and upon the sufficiency of the special pleas.

It may be stated at the outset that this is not a contest between private persons as to superior right by prior appropriation. When that question arises the courts will doubtless be entirely competent to deal with it.

The Rio Grande from El Paso to the Gulf of Mexico is the boundary line between Mexico and the United States, and under treaty between those republics the Rio Grande along such boundary is made free and common to the vessels and citizens of both countries. There is no guaranty by either Republic that the Rio Grande is or will continue to be navigable, but each party stipulated that it would not construct any work "below the intersection of the 31° 47' 30" parallel of latitude with the boundary line" which may impede or interrupt in whole or in part the exercise of the free and common use of the river.

Neither Mexico nor the United States surrendered any proprietary right to the adjacent soil or to any incident thereof. Indeed, it is expressly stipulated that the treaty shall not "impair the Territorial rights of either Republic within its established limits."

The legal-effect would have been the same had the reserving clause been omitted, as under the proper rule of construction the free and unobstructed passage is ceded without prejudice to other territorial rights. The continued enjoyment of other proprietary rights must be presumed unless expressly renounced. (Vattel Law Nations, Sec. 273.)

The territory of the United States includes the lakes, seas, and rivers lying within its limits; hence, rivers flowing through it form part of its domain and cannot be considered as free to other countries any more than the adjacent lands. An exception to this general rule has been sometimes claimed where the river flows from one State through the territory of another, in favor of the right of passage to and from the inland State for commercial and other peaceful purposes. While this exception has been sometimes contested (*ex. gr.* by Spain over the Mississippi, Great Britain over the St. Lawrence, Holland over the Scheldt), it is at best regarded as an imperfect right subservient to the convenience and safety of the State affected. (Wheaton International Law, 188-205; Polson Law Nations, 30.)

It therefore seems clear that there is no duty created by international law, or by treaty, which requires that the waters collected along the Rio Grande and lying wholly within the United States shall be so discharged as to aid in the navigation of the Rio Grande along the Mexican boundary, and the diversion of waters lying wholly within the United States is not a violation of any treaty rights

secured to Mexico. If it were otherwise, the secondary and dependent right of navigation would absorb the superior and primary territorial rights of the United States over its own domain, and subject lands wholly within the limits of this republic to the burdens of a servitude not expressed in the treaty, or implied from any reasonable interpretation of its language.

This brings us to a consideration of the question as to whether the Rio Grande is a navigable river in New Mexico and at the point known as Elephant Butte within the meaning of the acts of Congress of 1890 and 1892.

Counsel on each side of this case concede that the court takes judicial notice of what are navigable rivers, but for the enlightenment of the court in this matter a great mass of documentary information has been submitted, in the shape of maps, reports of exploring and surveying expeditions made under the War and Interior Departments of the Government, and also reports of officers especially detailed to investigate the feasibility of utilizing the river for navigation, and its capabilities for reservoirs and irrigation.

It will be observed that in the original bill it was not charged that the Rio Grande is a navigable river above El Paso, but charged that the river is navigable below El Paso and that defendant's proposed dam (125 miles above) will destroy the river as a stream, diminish the volume of water below, and materially affect its navigability. The amended bill charges that the river is navigable up as far as Roma, a short distance above the Gulf of Mexico, and is susceptible of navigation and has been navigated from Roma to a point 150 miles below El Paso (Presido del Norte) where the falls and rapids interrupt navigation, and that the river above the falls is susceptible of navigation up to La Joya, above Elephant Butte ;

the bill closes this part with an allegation that the river is navigable and susceptible of being navigated as aforesaid for carrying on commerce between the Territory of New Mexico, the State of Texas, and the Republic of Mexico.

The course of the Rio Grande in New Mexico is through rocky cañons, and sandy valleys; in the valleys it spreads out, shallow and between low banks; over fine, light, sandy soil of great depth; bars are continually forming, passing away and reforming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from four to 52 feet to the mile and the changes in its course are rapid, continual and often radical; the valley is scarred with low ravines made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise and these were of timbers; one of these instances occurred in 1858 or 1859 when a raft was sent down from Canutillo to El Paso, a distance of twelve miles; and the other recently when some telegraph poles were floated from La Joya, "a short distance." "The water of the stream especially in central and southern New Mexico is heavily loaded with silt." The channel of the river through these valleys is usually choked with sand and in times of low water the stream divides into a number of minor channels; and apparently a large percentage of the water is lost in these great deposits of fine material." (12 Annual Rep. Geol. Sur. 204.) "From Bernalillo (N. M.) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it." (10 Annual Rept. Geol. Sur. p. 99.) "From personal observation, I know that these seasons of flood and drouth (in Rio

Grande) were of about the same character thirty years ago." (Major Anson Mills, 10 U. S. Cav. Rept. Spec. Com. Sen., Vols. 3 & 4, p. 39.) But what is of more importance we have reports of officials upon the exploration of the river made under directions of the Government for the special purpose of considering its navigability. From these it appears: "The stream is not now navigable, and it can not be made so by an open channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks and dams could be made or not, but the heavy fall of the river, the lowness of its banks, and the small discharge, do not encourage the belief that such improvements would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of the many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them * * * In my judgment the stream is not worthy of improvement by the General Government." (Rept. of O. H. Ernst, Maj. of Engrs., to Secretary of War, 1889.) Again, "I consider the construction not only of an open river channel, but of any navigable channel, to be impracticable. * * * During the greater part of the year, when the river is low, the discharge would be insufficient to supply any navigable channel, except perhaps a narrow canal with locks, the construction of which, on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable." (Rept. of Gerald Bagnall, Asst. Engr., to Secretary of War, 1889).

The navigability of a river does not depend on its sus-

ceptibility of being so improved by high engineering skill and the expenditure of vast sums of money, but upon its natural present conditions.

In *Daniel Ball*, 10 Wallace, 557, the Supreme Court says: "Those rivers must be regarded as public navigable rivers in law, which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used in their *ordinary condition*, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel on water."

In the *Montillo* (20 Wallace, 431), the court says: "If it be capable *in its natural state* of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact and becomes a public river or highway. * * * The vital and essential point is whether the natural navigation of the river is such that it affords a channel for *useful commerce*."

The court approves the language of Chief Justice Shaw in *21 Pickering*, 344, who said: "In order to give it the character of a navigable stream it must be generally and commonly useful to some trade or agriculture." (See also *Morrison v. Colman* (Ala.), 3 L. R. A. 334.) Of course it need not be perennially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. While the capacity of a stream for floating logs, or even of thin boards, may be considered, yet the essential quality is that the capacity should be such as to subserve a useful public purpose. (Angell *Water Courses*, 535.) In a recent case the Supreme Court of Oregon say, per Thayer, C. J.: "Whether the creek in question is navigable or not for the purpose

for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate but a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation." And in the same case Lord, J., said: "It must be 'susceptible of beneficial use to the public;' be 'capable of such floatage as is of practical utility and benefit to the public as a highway.'" And of the stream then in question, he says: "It is not only not adapted to public use, but the public have made no attempt to use it for any purpose." (*Haines v. Hall* (Oregon), 3 L. R. A. 609.) The Supreme Court of Alabama says: "In determining the character of a stream, inquiry should be made as to the following points: whether it be fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to the public." (*Rhodes v. Otis*, 33 Ala. 578; *Peters v. M. O. M. & C. R. Co.*, 56 Ala. 523.) Indeed, in the letter of inquiry by the Hon. Richard Olney, Secretary of State, in respect to the facts as to navigability of the Rio Grande in interstate commerce, among other essential qualities, he says: "It should be remembered that a mere capacity to float a log or a boat will not alone make a river navigable. The question is whether the river can be used profitably for merchandise. I have been informed that wood is sometimes brought down the river to Ciudad Juarez in flat

boats, and that logs are rafted or floated down from the timbered lands or the upper river for commercial purposes." (Letter Jan. 4, 1897.) The Secretary of State seems to have been misinformed as to such use for commerce. This letter was addressed to Col. Anson Mills, at whose request, it appears, that applications for right of way for irrigation by the use of waters of the Rio Grande and all of its tributaries were suspended throughout New Mexico and Colorado. The answer of Col. Mills deals almost wholly with the river internationally; the river, in its relations to interstate commerce, is dismissed by him with an instance of the floating of a raft of logs in 1859 from a point 18 miles above El Paso, and the qualifying remark: "It would now hardly be practicable to do so." (Letter Jan. 7, 1897.)

The fact that dams have been erected across the river at El Paso and other places from the earliest times, and the fact that no use has been made of the stream for navigation or floatage, are facts which, though they do not in themselves determine its susceptibility of navigation, are, nevertheless, entitled to great weight. They are facts clearly indicating the common judgment and knowledge of the people who have had the longest and most intimate acquaintance with the capabilities of the river—a knowledge founded on their own experience and that of their ancestors.

The Rio Grande is not a navigable river in New Mexico.

The next point is that even though the Rio Grande be not navigable in New Mexico, still the contemplated obstruction will diminish the waters, and thereby impair the navigability of the river at points several hundred miles below near its mouth at the Gulf, and that therefore it is an obstruction within the meaning of the act of 1890.

Counsel for defendant raise the point that the undisputed fact is that a dam has been maintained for near two hundred years across the river at El Paso by which the waters of the Rio Grande are diverted into irrigating ditches in the city of El Paso and upon Mexican soil; and that in a proceeding in equity a chancellor cannot close his eyes to the fact that apparently some other purpose than navigation is the real object of this proceeding. If, however, the threatened act of the defendant be illegal I cannot agree that the Government becomes powerless to resist it merely because others are engaged in like enterprises.

We will therefore consider the question whether the contemplated obstruction at Elephant Butte will be an illegal interference with the navigability of the river several hundred miles below towards the Gulf. The act of 1890 (1 Sup. R. S. p. 803) prohibits the creation of obstructions "not affirmatively authorized by law" to the "navigable capacity" of any waters of the United States. Its terms are more comprehensive than the act of July 13, 1892, prohibiting the erection of dams, etc., etc., in any navigable river without the permission of the Secretary of War. It is contended that under the act of 1890 an obstruction, no matter where placed, is unlawful which diverts waters from flowing into a navigable river and thereby affects the navigable capacity of such a river. But a careful reading of the acts will not, I think, sustain the contention. The act applies only to obstruction to waters of which the United States has jurisdiction, and then only to the navigable capacity of such waters. The language is, "The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect of which the United States has jurisdiction, is hereby prohibited." Waters which are not

navigable are local and subject to local laws. The jurisdiction of Congress over waters arises from the power to regulate commerce between the States and foreign nations. *Veazie v. Moor*, 14 How. 568. *Gould Waters*, 34. Unless therefore the stream is navigable, and a means of communication between the States and foreign nations Congress is utterly without jurisdiction over it, except in respect of its riparian rights arising from the ownership of the soil through which such waters run.

We might close the opinion at this point, but the important interests and questions involved in this cause perhaps require a more extended consideration.

The riparian rights of the United States were surrendered in 1866 (R. S. 2339). Prior to that time it had become established that the common-law doctrine of riparian rights was unfitted to the conditions in the far West, and new rules had grown up under local legislation and customs more nearly analogous to the civil law. Recognizing that the public domain could not be utilized for agricultural and mining purposes without the use of water applied by artificial means, and that vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the right of prior appropriation of waters by the act above mentioned, where the same "are recognized and acknowledged by the local customs, laws, and decisions of the courts." (Sec. 2339.) The Supreme Court of the United States, in passing upon this act, observes: "It is evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition." *Atchison v. Peterson*, 20 Wal. 507; *Basey v. Gallagher*, 20 Wal. 671. And since 1870

patents for lands expressly except vested water rights. Of course, Congress may resume its control, but there can be no presumption of an intent to take them out of local control and resume regulative power from doubtful expression. Repeals by implication are not so favored. Congress could undoubtedly preserve navigable streams by legislating against the use of their confluence. But that power could not be exercised against those private rights which have become vested, unless under the power of eminent domain compensation be paid therefor.

Instead of an intention to resume such control, Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region, and under local regulative control. Following in line with the act of 1866 the act of 1877 authorized the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. This act again distinctly recognized the validity of the right of prior appropriation, and also provided that "all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights." This act was limited to States and Territories in the arid region (1 Sup. R. S. p. 137). Colorado was included in 1891 (1 Sup. R. S. 941). By the act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation; it provided for the selection of sites for reservoirs, for the storage and utilization of water for irrigation and the prevention of overflow, and that the lands designated for reservoirs, ditches or canals, and all lands susceptible

of irrigation therefrom, be reserved from sale or entry (1 Sup. R. S. 698). In 1890 the reservation from sale or entry of lands except as to reservoir sites was repealed; reservoir sites remained segregated (1 Sup. R. S. 791-792). In the same year it was provided that patents for lands west of the 100th meridian should reserve the right of way for ditches and canals (1 Sup. R. S. 792). In 1891 public lands were opened to private location for the right of way to the extent of the ground occupied by the water of the reservoir, canal and laterals and 50 feet on the margin. In this act it was provided that "the privilege herein granted shall not be construed to interfere with the control of the water for irrigation and other purposes under authority of the respective States or Territories" (1 Sup. R. S. 946). On the 26th day of February, 1897, Congress opened the reservoir site, reserved by the Government under the act of 1891, to private location, and the local legislatures were authorized to prescribe rules and regulations and fix water charges.

From these acts two things are manifest, that (1) the use of the water for irrigation purposes was authorized; and (2) that the local laws should govern the use of that water for such purposes.

In harmony with this use the Interior Department holds that in granting the right of way for reservoirs and canals it does not and cannot assume to determine or prescribe water rights, and that the flow and the use of the water is a matter exclusively under State or Territorial control. (Decisions Interior Depart., Vol. 18, 168.)

"The region in which agriculture depends on irrigation includes about four-tenths of the entire area of the United States, not including Alaska." (Report of Director Geol. Sur. to Sec. of Interior, Mar. 13, 1888.) Throughout the vast tract classed as the arid region, ex-

tending west from about the 100th parallel, there is little or no use of water for navigation, but the cultivation of millions of acres of land is necessarily dependent upon the use of it. The authority to grant permission to divert waters for such purpose is not given to the Secretary of War, neither is it given to anyone else. Yet if such waters cannot be diverted, millions of acres now in cultivation must be turned back, a waste country, or the cultivation continued in violation of law, civil and criminal. These may be said to be considerations of policy with which the courts have nothing to do. If the law be clear, this is undoubtedly true, and the courts must administer it; but in ascertaining what the law is we cannot refrain from examining the path we are invited to pursue. The hardships and inconveniences which would result from not simply an individual case, but from the establishment of a rule, is an argument against it. And after all there is much soundness in the observation of one of the foremost of American jurists, that the growth of the law is in truth legislative. "The very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis." (Holmes Com. Law, Lec. 1, p. 35.) The *Genesee Chief* case is an illustration of this. There the court disregarded the arbitrary distinction in respect to the ebb and flow of the tide suitable to condi-

tions in England and which have been followed in the earlier cases in the United States, and it was held that the admiralty and maritime jurisdiction of the United States extended to the Great Lakes and rivers without limit as to the tide, and that this jurisdiction was not founded upon the clauses of the Constitution in respect to regulating commerce, but solely by virtue of its admiralty and maritime power. The English rule was appropriate enough until the application of steam power to navigation opened the great rivers to commerce. (12 Howard, 450.)

Considering the discussion in Congress, the reports of committees, and the labors and reports of officials in the Interior and War Departments made under Congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region had become the recognized policy and a measure of the highest public importance and necessity. It would seem that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but, such as it is, reservoir sites have been located, surveyed, and established along the streams, navigable and non-navigable, under the immediate direction of Government officials, and by authority of Congress, and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

Ruins of extensive irrigation systems scattered all over New Mexico and Arizona, of a prehistoric people, show that conditions which have confronted the present age

were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande valley by acequias from the river is mentioned by the earliest of Spanish priests and explorers, and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this Government was to declare that "The laws heretofore in force concerning water courses * * shall continue in force." Code proclaimed by Brig. Gen. Kearney, Sept. 22, 1846.

One of the first acts of the local legislature (1852) after the organization of the Territory, provided that "All rivers and streams of water in this Territory, formerly known as public ditches or acequias, are hereby established and declared to be public ditches or acequias." (Com. Laws, Sec. 6.) In 1874 it was provided that "all of the inhabitants of the Territory of New Mexico shall have the right to construct either private or common acequias, and to take water for the said acequias from wherever they can, with the distinct understanding to pay the owner through whose land said acequias have to pass a just compensation for the land used." C. L., Sec. 17.

In 1887 an act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake, or spring, provided it does not interfere with prior appropriations. (Session Acts, 1887, chap. 12.) Other acts have been passed since upon the subject in regard to the acquisition of water rights.

But this legislation is not peculiar to New Mexico; its general characteristics are common throughout the West where the doctrine of prior appropriation prevails. This

was the character of local legislation which Congress recognized, confirmed and authorized by the various acts to which reference has been made. As an indication of the scarcity of the supply and of the great value attached to water one of the early acts of the legislature prohibited the making of paths across the fields, as they were calculated to divert the flow of the water and injure acequias. The doctrine of prior appropriation has been the settled law of this Territory by legislation, custom and judicial decision. Indeed, it is no figure of speech to say that agricultural and mining life of the whole county depends upon the use of the waters for irrigation, and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio Grande Valley in New Mexico.

Therefore the diversion of such local waters is not a violation of any Act of Congress even though the navigable capacity of the river at a distance below may become thereby impaired.

In conclusion, it is therefore held that the Rio Grande is not a navigable river above El Paso and that the waters thereof are local waters under local control, by the authority of Congress, and that their interruption and diversion is not a violation of any law of the United States or any treaty. In this view of the case it appears that the bill as amended is without equity and the injunction heretofore granted should be dissolved. It will be unnecessary to decide whether the waters of a navigable river may be diverted as that issue does not arise in this case. As the bill is without equity other questions which have been raised need not be considered.

GIDEON D. BANTZ,
Judge and Chancellor.

OPINION OF THE SUPREME COURT OF NEW MEXICO.

This is a suit in equity brought by the United States to restrain the Rio Grande Dam and Irrigation Company from constructing or maintaining a dam across the Rio Grande River, in the Territory of New Mexico. The structure especially aimed at is a dam projected and about to be built by the defendant company at a point called Elephant Butte, the object of which is to take water from the river, and store it in reservoirs, for the purpose of irrigation. The ground upon which the claim of the Government is predicated is that the Rio Grande is a navigable river, and that the proposed dam will obstruct the navigation of the river, the flow of waters therein, and interfere with its navigable capacity, and that such obstructions would be contrary to the treaty with Mexico, and in violation of the acts of Congress.

A preliminary injunction was granted and defendant ordered to show cause why it should not be continued. The defendant answered, denying that the Rio Grande is a navigable river, and also filed pleas justifying under its right of way for canals, and reservoirs secured under the act of Congress of 1891 and certain Territorial laws. Upon the hearing, the court below held that upon the facts presented by affidavit, as well as other facts of which it took judicial notice, the Rio Grande is not a navigable stream within the Territory of New Mexico, and that the bill does not state a case entitling it to the relief prayed; and upon the complainant's declining to amend its bill further the court dissolved the injunction and dismissed the bill. From that judgment the United States appealed to this court.

The right of the United States to prevent the construc-

tion of the irrigation works in question is sought to be deduced chiefly from two acts of Congress, viz :

1. The act of September 19, 1890, sec. 10, which prohibits "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters in respect to which the United States has jurisdiction."

2. The act of July 13, 1892, sec. 3, which declares that it shall not be lawful "to build any dam, weir, or structure of any kind in any navigable waters of the United States without the permission of the Secretary of War, in any port, roadstead, haven, harbor, navigable river, or other waters of the United States, in such manner as shall obstruct or impair navigation, commerce, or anchorage of said water."

Some allusion has been made to the treaty of Guadalupe Hidalgo of 1848, between the United States and Mexico, as containing stipulations which would be violated by permitting the contemplated construction to proceed. The only provision of that treaty bearing upon this subject simply provides in article 7, that the part of the Rio Grande lying below the southern boundary of New Mexico is divided in the middle between the two Republics, and that the navigation below said boundary "shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right." Manifestly this applied only to that portion of the river below the boundary of New Mexico, for the same article contains the further qualifying clause that—

"The stipulations contained in the present article shall not impair the territorial rights of either Republic within its established limits."

Furthermore, the treaty of 1854, known as the Gadsden treaty, contains an express provision that the stipulations and restrictions of the 7th article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Grande "below the intersection of the 31 degree 57 min. 30 sec. parallel of latitude with the boundary line established by that treaty."

There is no undertaking by either of the parties to these treaties that the Rio Grande is, or shall continue to be, navigable. All that either agreed to in this connection was that it would not construct, below the point of intersection of the above-mentioned parallel of latitude, which is about that of El Paso, any work which would interfere with the common use of the river. No obligation devolved upon the United States to conserve the waters of the river above that point for the purpose of facilitating navigation below it.

We think the whole question turns upon the applicability of the acts of Congress above mentioned. By their express terms these acts deal only with navigable waters. Unless the Rio Grande is a navigable stream; and its "navigation" or "navigable capacity" will be obstructed by the proposed dam, these statutes do not apply to the case, and cannot be invoked to enable the Government to stop the progress of the work by injunction.

It is alleged in the original bill that the Rio Grande, from and including the site of the proposed dam, has been used to float logs for commercial and business purposes, and for affording a means for commercial traffic within and between the Territory of New Mexico and the State of Texas and the Republic of Mexico. In the amended bill it is alleged that the said river is susceptible of navigation for commercial purposes up to La Joya, in the Territory of New Mexico, about one hundred miles above

Elephant Butte. In both the river is alleged to be navigable at certain points below El Paso.

It is conceded that the navigability of waters is a matter of which courts take judicial notice. The record contains a large mass of information, in the form of maps, reports of exploring and surveying expeditions made under the direction of the War and Interior Departments, and also reports of officers specially detailed to investigate the feasibility of rendering the river commercially navigable by improvements, and also its capability of supplying reservoirs for irrigation.

From these and other data the following facts, as stated in the opinion of the court below, are well established :

The course of the Rio Grande, in New Mexico, is through rocky cañons and sandy valleys. In the valleys it spreads out shallow and between low banks ; over fine, light, sandy soil of great depth ; bars are continually forming, passing away, and reforming, and the quicksands in the bed of the stream and along its margin are perilous to life. The fall is from forty to fifty-two feet to the mile, and the changes in its course are rapid, continual, and often radical ; the valley is scarred with low ravines, made by its progress in different places. In all the period of time only two instances were shown where the river was actually utilized for the conveyance of merchandise, and these were of timbers ; one of these instances occurred in 1858 or 1859, when a raft was sent down from Canutillo to El Paso, a distance of 12 miles ; and the other recently, when some telegraph poles were floated from La Joya, a "short distance." "The water of the stream, especially in central and southern New Mexico, is heavily loaded with silt. The channel of the river through these valleys is usually choked with sand, and in times of low water the stream divided into a number of minor channels, and apparently a

large percentage of the water is lost in these great deposits of fine material" (12 Annual Rpt. Geol. Sur., 204). "From Bernalillo (N. M) to Fort Hancock (Tex.) the Rio Grande is in the highest degree spasmodic, with immense floods during a few weeks of the year and a small stream during the remainder of it" (10 Annual Rpt. Geol. Sur., p. 99). "From personal observation, I know that these seasons of flood and drouth (in the Rio Grande) were of about the same character 30 years ago" (Maj. Anson Mills, 10 U. S. Cav. Rept. Spec. Com. Sen., Vols. 3 and 4, p. 39). But what is of more importance, we have reports of officials upon the exploration of the river, made under the direction of the Government, for the special purpose of considering its navigability. From these it appears: "The stream is not now navigable, and it cannot be made so by open-channel improvement. An accurate survey and hydrometric observations would be necessary to determine positively whether an improvement by locks or dams could be made or not, but the heavy fall of the river, the lowness of its banks, and the small discharge do not encourage the belief that such improvement would be financially, even if physically, practicable. Certainly there is no public interest which would justify the expenditure of many millions of dollars which such an improvement would involve. The irrigation of the valley is a matter in which the inhabitants are now deeply interested, while the possible navigation of the river receives little or no attention from them. In my judgment, the stream is not worthy of improvement by the General Government" (Report of O. H. Ernst, Major of Engineers, to Secretary of War, 1889). Again: "I consider the construction, not only of an open river channel, but of any navigable channel, to be impracticable. During the greatest part of the year, when the river is low, the discharge would be

insufficient to supply any navigable channel, except, perhaps, a narrow canal, with locks, the construction of which on a foundation of sand, in places forty feet deep, would be financially, if not physically, impracticable" (Report of Gerald Bagnall, Assistant Engineer, to Secretary of War, 1889).

The navigability of a river does not depend upon its susceptibility of being so improved by high engineering skill and the expenditures of vast sums of money, but upon its natural present conditions. In the *Daniel Ball* (10 Wallace 557), the Supreme Court says: "Those rivers must be regarded as public navigable rivers in law which are navigable in fact, and they are navigable in fact when they are used or are susceptible of being used, in the ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." In the *Montello* (20 Wallace, 431) the court says: "If it be capable in its natural state of being used for purposes of commerce, no matter in what mode that commerce may be conducted, it is navigable in fact and becomes a public river or highway. The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce." The Court approves the language of Chief Justice Shaw, in *21 Pickering*, 344, who said: "In order to give it the character of a navigable stream it must be generally and commonly useful to some trade or agriculture." See also *Morrison v. Coleman* (Ala.) (3 L. R. A. 334). Of course it need not be perennially navigable, but the seasons of navigability must occur regularly and be of sufficient duration and character to subserve a useful public purpose for commercial intercourse. While the capacity of a stream for floating logs or even thin boards may be considered, yet the essential quality is that

the capacity should be such as to subserve a useful public purpose. (Angell Water Courses, 335.) In a recent case the Supreme Court of Oregon says, per Thayer, C. J.: "Whether the creek in question is navigable or not for the purposes for which appellant used it, depends upon its capacity in a natural state to float logs and timber, and whether its use for that purpose will be an advantage to the public. If its location is such and its length and capacity so limited that it will only accommodate a few persons it cannot be considered a navigable stream for any purpose. It must be so situated and have such length and capacity as will enable it to accommodate the public generally as a means of transportation." And in the same case Lord, J., said: "It must be susceptible of beneficial use to the public," be "capable of such floatage as is of practical utility and benefit to the public as a highway." And of the stream then in question, he says: "It is not only not adapted to public use, but the public have made no attempt to use it for any purpose." (Haines v. Hall (Oregon), 3 L. R. A. 609.) The Supreme Court of Alabama says: "In determining the character of a stream, inquiry should be made as to the following points: Whether it be fitted for valuable floatage; whether the public or only a few individuals are interested in transportation; whether any great public interests are involved in the use of it for transportation; whether the periods of its capacity for floatage are sufficiently long to make it susceptible of use beneficially to public. (Roads v. Otis, 33 Ala., 578; Peters v. N. O., M. & C. R. Co., 56 Ala. 523.) In the letter of inquiry by the Honorable Richard Olney, Secretary of State, in respect to the facts as to the navigability of the Rio Grande, in interstate commerce among other essential qualities, he says: "It should be remembered that a mere capacity

to float a log or a boat will not alone make a river navigable. The question is, whether the river can be used profitably for merchandise. I have been informed that wood is sometimes brought down the river to Ciudad Juarez in flat-boats and that logs are rafted or floated down from the timbered lands on the upper river for commercial purposes." (Letter January 4, 1897.) The Secretary of State seems to have been misinformed as to such use for commerce. This letter was addressed to Col. Anson Mills, at whose request it appears that applications for right of way for irrigation by the use of the waters of the Rio Grande and all its tributaries were suspended throughout New Mexico and Colorado. The answer of Col. Mills deals almost wholly with the river internationally; the river, in its relation to interstate commerce, is dismissed by him with the instance of the floating of a raft of logs in 1859 from a point 18 miles above El Paso, and the qualifying remark "It would now hardly be practicable to do so." (Letter January 7th, 1897.)

It is perfectly clear that the Rio Grande above El Paso has never been used as a navigable stream for commercial intercourse in any manner whatever, and that it is not now capable of being so used. On the other hand it has been, from the earliest times of which we have any knowledge, used as a source of water for irrigation. Its valley has always been the center for population in New Mexico. It was the first portion of this region to be occupied and settled by civilized men, and the population of this valley has always been, and is now, absolutely dependent for means of livelihood and subsistence upon the use of the waters of this river for irrigation of their fields and crops. Dams have been erected and maintained at El Paso for nearly 200 years, by which the river has been obstructed and its waters diverted for irrigation to both sides

of the Rio Grande. But never until the present time, so far as we can ascertain, has any question been raised by any one as to interference with any use of the river for purpose of navigation. Indeed, it appears from the affidavits and reports presented in support of the bill in this case that the objection now raised to the construction of the defendant's dam grows out of the construction of an international dam and reservoir at El Paso, to be constructed under the auspices of the two Governments. The investigation of the feasibility of such an international dam and reservoir is being made on behalf of the United States under the authority of Congress, thus evincing the deliberate intention of the Government, by its political department, to take measures, not for the purpose of improving the navigability of this river, but of permanently constructing at a point far below the site of defendant's works, and thus to devote the stream to irrigation instead of navigation. One of the affidavits in support of the bill is made by the Commissioner of the United States engaged upon this investigation, the object of which he states to be "the study of a feasible project for the equitable distribution of the waters of the Rio Grande to all persons residing on its banks or tributaries having equitable interests therein." And he also states in one of his reports that "the probable flow of water in the river here (El Paso) is likely to be ample for the supply of the proposed international reservoir, but that the flow will not be sufficient to supply the proposed international reservoir of the Rio Grande Irrigation Company, at Elephant Butte, in New Mexico, or any other similar reservoirs in New Mexico, and but one of these schemes can be successfully carried out."

That is to say, in order to render feasible the storage of water for irrigation at El Paso, it is essential to pro-

hibit all similar structures along the river at points above.

From these extracts it seems clearly apparent that the work at El Paso, to which the United States has committed itself, tentatively, at least, is not designed to preserve or improve the navigable capacity of the river, but to facilitate the distribution of the waters which may be gathered by obstructing the stream for the benefit of riparian occupants, and that the object of this proceeding is not to secure a public benefit from the navigation of the Rio Grande, but rather, under the guise of a question of navigability of the stream, to obtain an adjudication of the interests of rival irrigation schemes, in aid of one locality against another.

Manifestly neither the acts of Congress cited nor the provisions of the treaty have any application to questions of this kind, and they can not be invoked to settle conflicting local interests whose determination must necessarily depend upon entirely different considerations.

The Rio Grande, as we have said, flows through a region dependent upon irrigation. It is a part of what is known as the arid region of this country, embracing, according to the report of the Director of the Geological Survey, about four-tenths of the entire area of the United States, in which the rainfall is not sufficient for the production of crops. Here the paramount interest is not the navigation of the streams, but the cultivation of the soil by means of irrigation. Even if, by the expenditure of vast sums of money in straightening and deepening the channels, the uncertain and irregular streams of this arid region could be rendered to a limited extent navigable, no important public purpose could be subserved by it. Ample facilities for transportation, adequate to all the requirements of commerce, are furnished by the railroads, with which these

comparatively insignificant streams could not compete. But, on the other hand, the use of the waters of all these streams for irrigation is a matter of the highest necessity to the people inhabiting this region, and if such use were denied them it would injuriously affect their business and prosperity to an extent that would be an immeasurable public calamity. These conditions have been distinctly recognized in the legislation of Congress, for while it has refrained from any attempt to render streams like the Rio Grande navigable by artificial works, and has not in any way treated them as navigable waters, Congress has, by the reservation or survey of reservoir sites along its valley, and the appropriation of large sums of money for the prosecution of investigations and surveys to this end, clearly indicated its purpose to treat these waters as suitable only for irrigation, and to consider such a use of them as the one of commanding importance.

The riparian rights of the United States were surrendered in 1866 (R. S. 2339); prior to that time it had become established that the common-law doctrine of riparian rights was unfitted to the conditions in the far West, and new rules had grown up under local legislation and customs more clearly analogous to the civil law. Recognizing that the public domain could not be utilized for agricultural and mining purposes without the use of water applied by artificial means, and that vast interests had grown up under the presumed license of the Federal Government to the use of such waters, Congress confirmed the rights of prior appropriation of waters by the act above mentioned, where the same "are recognized and acknowledged by the local customs, laws, and decisions of the courts." (Sec. 2339.) The Supreme Court of the United States, in passing upon this act, observes: "It is evident that Congress intended, although the language

used is not happy, to recognize as valid the customary law with respect to the use of the water which had grown up among the occupants of the public lands under the peculiar necessities of their condition." (*Atchison v. Peterson*, 20 Wal. 507 ; *Basey v. Gallagher*, 20 Wal. 671.) And since 1870 patents for lands expressly except vested water rights.

Congress has manifested a purpose to extend the largest liberty of use of waters in the reclamation of the arid region under local legislative control. Following in line with the act of 1866 the act of 1877 authorized the entry of desert lands in the arid region by those who intend to reclaim them by conducting water upon them. This act again distinctly recognized the validity of the right of prior appropriation, and also provided that: "All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing rights." This act was limited to States and Territories in the arid region. (1 Supp. R. S., p. 137.) Colorado was included in 1891. (1 Supp. R. S., pp. 249-241.) By the act of 1888 (an appropriation bill) an investigation was directed as to the extent to which the arid region might be redeemed by irrigation ; it provided for the selection of sites for reservoirs, for the storage and utilization of water for irrigation and prevention of overflows, and that the lands designated for reservoirs, ditches, or canals, and all lands susceptible for irrigation therefrom be reserved from sale or entry. (1 Supp. R. S., 698.) In 1890 the reservation from sale or entry of lands, except as to reservoir sites, was repealed, reservoir sites remained segre-

regulated. (1 Supp. R. S., 791-792.) In the same year it was provided that patents for lands west of the 100th meridian should reserve the right of way for ditches and canals. (1 Supp. R. S., 792.) In 1892 public lands were opened to private location for the right of way to the extent of the ground occupied by the water of the reservoir, canals, and laterals, and fifty (feet) on the margin. In this act it was provided that "the privilege herein granted shall not be construed to interfere with the control of the water for irrigation and other purposes under authority of the respective States and Territories." (1 Supp. R. S., 946.) On the 26th day of February, 1897, Congress opened the reservoir sites reserved by the Government under the act of 1891, to private location, and the local legislators were authorized to prescribe rules and regulations and fix water charges. (Decision Interior Department, Vol. 18, p. 168.)

Considering the discussions in Congress, the reports of committees, and the labors and reports of officials in the Interior and War Departments, made under Congressional directions, it seems quite manifest that the purpose by the Federal Government to hold and further redeem the great arid region had become the recognized policy and the measure of the highest public importance and necessity. It would seem that at first it was the design to establish and maintain an elaborate system of irrigation at public expense, but the immense cost of such an enterprise seems to have induced its abandonment, temporarily, at least, and in its stead another system has been provided by irrigation at private cost. The system may be incomplete in many of its details, but such as it is, reservoir sites have been located, surveyed, and established along the streams, navigable and non-navigable, under the immediate direction of Government officials, and by

authority of Congress, and the right to make private entries of others under the supervision of the Secretary of the Interior is also authorized.

Ruins of extensive irrigation systems scattered all over New Mexico and Arizona, of a prehistoric people, show that conditions which have confronted the present age were conditions encountered in the remote past and apparently overcome. The cultivation of the Rio Grande valley by acequias from the river is mentioned by the earliest of Spanish priests and explorers, and is established by authentic historical memorials extending back more than two centuries. The law of prior appropriation existed under the Mexican Republic at the time of the acquisition of New Mexico, and one of the first acts of this Government was to declare that "The laws heretofore in force concerning water courses shall continue in force." Code proclaimed by Brigadier-General Kearney, September 22, 1846. One of the first acts of the local legislature (1852) after the organization of the Territory provided that "All rivers and streams of water in this Territory, formerly known as public ditches or acequias, are hereby established to be public ditches or acequias." (Com. Laws, sec. 6.) In 1874 it was provided that "All of the inhabitants of the Territory of New Mexico shall have the right to construct either private or common acequias, and to take the water for said acequias from wherever they can, with the distinct understanding to pay the owner through whose lands said acequias have to pass a just compensation for the land used." (C. L., sec. 17.) In 1887 an act was passed giving authority to corporations to construct reservoirs and canals, and for this purpose to take and divert the water of any stream, lake, or spring, provided it does not interfere with prior appropriations. (Session Acts, 1887,

chap. 12.) Other acts have been passed since upon the subject in regard to the acquisition of water rights. But this legislation is not peculiar to New Mexico ; its general characteristics are common throughout the West, where the doctrine of prior appropriation prevails. This was the character of local legislation which Congress recognized, confirmed, and authorized by the various acts to which reference has been made. The doctrine of prior appropriation has been the settled law of this Territory by legislation, custom, and judicial decision. Indeed; it is no figure of speech to say that agriculture and mining life of the whole country depends upon the use of the waters for irrigation ; and if rights can be acquired in waters not navigable, none can have greater antiquity and equity in their favor than those which have been acquired in the Rio Grande Valley in New Mexico.

It is contended that because the Rio Grande is capable of navigation to a limited extent several hundred miles below the point of the proposed dam its construction will, by arresting the flow of water in the stream, interfere with its navigable capacity and that it is therefore prohibited by the act of 1890. From the foregoing discussion of the legislation of Congress and the conditions prevailing in the region under consideration it would seem to follow that if there were a conflict between the interests of navigation and agriculture in relation to a stream like the Rio Grande that the latter would prevail. Certainly it should be held to be under the protection of the courts against any doubtful interpretation or application of a penal statute. If the waters of the Rio Grande are not navigable in New Mexico, which we hold to be the case, then they can not be said to be waters in respect of which the United States has jurisdiction. And certainly in the absence of some express declaration to that

effect it can not be supposed that Congress intended to strike down and destroy the most important resource of this vast region in order to promote the insignificant and questionable benefit of the navigation of the Rio Grande for a short distance above its mouth. For the construction contended for does not limit the prohibition of the Act of Congress to the works proposed by the defendant. It applies to the maintenance as well as the original creation of obstructions. If defendant's dam at a point where the river is not navigable is an obstruction to the navigable capacity of the river several hundred miles below, the same must be said of every dam and irrigation ditch which diverts water from the river or any of its confluents to their primary sources. If upon this ground it is competent for the United States to prohibit the erection of defendant's dam it is equally competent for it to compel the removal of every dam and headgate heretofore constructed in the Rio Grande and its tributaries and prohibit the use of their waters for irrigation throughout this entire valley. It is true that courts must administer the law as they find it, and if it is clear and free from doubt the consequences, however disastrous, cannot be considered as affording grounds for its non-enforcement. But in a case like this, where it is sought by intendment to give to a statute a meaning not apparent on its face, it is the duty of the courts to give full weight to these considerations in determining what was the intention of Congress. And in view of the condition and history of the region which would be affected the unimportance of the Rio Grande as a waterway for commercial intercourse at any point, its non-navigability at the place of the proposed construction and for hundreds of miles below, and the evident purpose of Congress by its legislation to promote irrigation throughout this portion of the country, even to the extent

of further obstruction of this very stream, it would in our opinion be unreasonable to hold that legislation which has a definite and well understood purpose in furtherance of the public interest in those portions of the country to whose conditions it is applicable was intended to operate to the detriment of the public interests in regions to whose conditions it is not applicable and where its enforcement would be destructive of every interest which the legislation of Congress has otherwise undertaken to promote.

We therefore hold that the work sought to be enjoined in this action is not in violation of any law of the United States, or any treaty, and that the judgment of the district court dissolving the injunction and dismissing the bill should be affirmed, and it is so ordered.

THOMAS SMITH,

Chief Justice.

I concur in the conclusion reached.

H. B. HAMILTON, A. J.

N. B. LAUGHLIN, A. J.

Statement of the Case.

UNITED STATES *v.* RIO GRANDE DAM AND
IRRIGATION COMPANY.APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW
MEXICO.

No. 215. Argued November 7, 8, 1898. — Decided May 22, 1899.

The river, Rio Grande, within the limits of New Mexico, is not a stream over which, in its ordinary condition, trade and travel can be conducted in the customary modes of trade and travel on water.

The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream; but every State has the power, within its dominion, to change this rule, and permit the appropriation of the flowing waters for such purposes as it deems wise: whether a Territory has this right is not decided.

By acts of Congress referred to in the opinion, Congress recognized and assented to the appropriation of water in contravention of the common law rules; but it is not to be inferred that Congress thereby meant to confer on any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States.

The act of September 19, 1890, c. 907, on this subject, must be held controlling, at least as to any rights attempted to be created since its passage.

ON May 24, 1897, the United States, by their Attorney General, filed their bill of complaint in the district court of the third judicial district of New Mexico against the Rio Grande Dam and Irrigation Company, the purpose of which was to restrain the defendant from constructing a dam across the Rio Grande River in the Territory of New Mexico, and appropriating the waters of that stream for the purposes of irrigation. A temporary injunction was issued on the filing of the bill. Thereafter, and on the 19th day of June, 1897, an amended bill was filed, making the Rio Grande Irrigation and Land Company, Limited, an additional defendant, the scope and purpose of the amended bill being similar to that of the original. The amended bill stated that the original defendant was a corporation organized under the laws of the Territory of New Mexico, and the new defendant a corpora-

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tion organized under the laws of Great Britain. It was averred that the purpose of the original defendant, as set forth in its articles of incorporation and as avowed by it, was to construct dams across the Rio Grande River in the Territory of New Mexico at such points as might be necessary, and thereby "to accumulate and impound waters from said river in unlimited quantities in said dams and reservoirs, and distribute the same through said canals, ditches and pipe lines." The new defendant was charged to have become interested as lessee of or contractor with the original defendant. The bill further set forth that the new defendant "has attempted to exercise and has claimed the right to exercise all the rights, privileges and franchises of the said original defendant, and has given out as its objects as said agent, lessee or assignee, as aforesaid, to construct said dams, reservoirs, ditches and pipe lines and take and impound the water of said river, and thereby to create the largest artificial lake in the world, and to obtain control of the entire flow of the said Rio Grande and divert and use the same for the purposes of irrigating large bodies of land, and to supply water for cities and towns, and for domestic and municipal purposes, and for milling and mechanical power;" "that the Rio Grande receives no addition to its volume of water between the projected dam and the mouth of the Conchos River, about three hundred miles below, and that the said Rio Grande, from the point of said projected dam to the mouth of the Conchos River, throughout almost its entire course from the latter part to its mouth, flows through an exceedingly porous soil, and that the atmosphere of the section of the country through which said river flows, from the point above the dam to the Gulf of Mexico, is so dry that the evaporation proceeds with great rapidity, and that the impounding of the waters will greatly increase the evaporation, and that from these causes but little water, after it is distributed over the surface of the earth, would be returned to the river." The bill also averred that the Rio Grande River was navigable and had been navigated by steamboats from its mouth three hundred and fifty miles up to the town of Roma, in the State of Texas; that it

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was susceptible of navigation above Roma to a point about three hundred and fifty miles below El Paso, in Texas, and then, after stating that there were certain rapids or falls which there interfered with navigation, it alleged navigability from El Paso to La Joya, about one hundred miles above Elephant Butte, the place at which it was proposed to erect the principal dam, and that it had been used between those points for the floating and transportation of rafts, logs and poles. The bill further alleged "that the impounding of the waters of said river by the construction of said dam and reservoir at said point, called Elephant Butte, about one hundred and twenty-five miles above the city of El Paso, said point being in the Territory of New Mexico, and the diversion of the said waters and the use of the same for the purposes hereinbefore mentioned, will so deplete and prevent the flow of water through the channel of said river below said dam, when so constructed, as to seriously obstruct the navigable capacity of the said river throughout its entire course from said point at Elephant Butte to its mouth." Then, after denying that any authority had been given by the United States for the construction of said dam, it set forth the treaty stipulations between the United States and the Republic of Mexico in reference to the navigability of the Rio Grande, so far as it remained a boundary between the two nations.

To this amended bill the defendants filed their joint and several pleas and answer. The pleas were principally to the effect that the site of the proposed dam was wholly within the Territory of New Mexico, and within its arid region; that in pursuance of several acts of Congress the Secretary of the Interior and the officers of the Geological Survey had located and segregated from the public domain a reservoir site called "38" on the river just above Elephant Butte, and another called "39" just below that point; that subsequently, in pursuance of another act of Congress, these and all other reservoir sites were thrown open to corporate and private entry; that the original defendant had applied to enter the two sites, "38" and "39;" that it was incorporated under the laws of New Mexico and had complied with all the laws

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of that Territory in reference to the construction of reservoirs and dams and the diversion of waters of public streams; that it had duly filed proof of its organization, its maps of survey of reservoir and canals, with the Secretary of the Interior, and had secured his approval thereof in accordance with the laws of the United States. The answer admitted incorporation, the purpose to construct a dam and reservoir at Elephant Butte, and then proceeded, "but in so far as that portion of said bill is concerned, which charges that the Rio Grande Irrigation and Land Company, Limited, is seeking to obtain control of the entire flow of said Rio Grande, and to divert and use the same, these defendants state that the entire flow of the Rio Grande during the irrigation season at the point or points where these defendants are seeking to construct reservoirs upon the same, has long since been diverted and is now owned and beneficially used by parties other than these defendants, in which diversion and appropriation of said waters these defendants have no property rights, and that neither one of the defendants is seeking or has ever sought to appropriate or divert by means of structures above referred to, or contemplated diversion by means thereof, of any of the waters of said Rio Grande usually flowing in the bed thereof during the time when the same are usually put to beneficial use by those who have heretofore diverted the same; but on the contrary these defendants state that it has been their intention, and their sole intention, by means of the structures which they contemplate and which are complained of in said bill, to store, control, divert and use only such of the waters of said stream as are not legally diverted, appropriated, used and owned by others, and that these defendants have contemplated and now contemplate that any beneficial rights by them acquired in such stream by virtue of such structures will be very largely only so acquired to the excess, storm and flood waters thereof now unappropriated, useless and which go to waste."

The answer also denied that the river was susceptible of navigation, or had been navigated above Roma, in the State of Texas, or had been used beneficially for the purposes of navigation in the Territory of New Mexico, or was susceptible

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of being so used; that the contemplated use of the waters would deplete the flow thereof through the channel so as to seriously obstruct the navigability of the river at any point below the proposed dam; that defendants were proposing to construct a dam and reservoir without due process of law, or that the contemplated dam and reservoir would be a violation of our treaties with Mexico. The United States filed a general replication. Defendants moved to dissolve the temporary injunction, while the Government moved to have the several pleas set down for argument as to their sufficiency as a defence. Several affidavits and documents were filed by the respective parties. On July 31, 1897, the matters came on for hearing, whereupon the court entered a decree, which recited that the parties appeared by their counsel "under the rule heretofore made upon the defendant, Rio Grande Dam and Irrigation Company, to show cause, if any it had, why the injunction, heretofore granted, restraining it from maintaining and erecting a dam in the Rio Grande River at a point called Elephant Butte, fully described in the original and amended bills, filed herein and in said order, should not be continued; and the said complainant, the United States of America, having filed an amended bill in said cause, making the Rio Grande Irrigation and Land Company, Limited, a party thereunder, and the said defendant, in answer to said amended bill, having filed a special plea in bar and having also answered said amended bill and also filed a motion to dissolve the injunction and to dismiss the original and amended bills so filed by complainant herein, and the complainant thereupon having filed its motion to set down defendants' pleas for argument as to their sufficiency as defence to said suit as a matter of law, and the court having heard the arguments of counsel and having read the affidavits, extracts from geological reports, agricultural reports, reports of engineers and of the Secretary of War, histories and other sources of information, and having had submitted to it an official map of the Territory of New Mexico and of the United States of America, showing the source, trend, course and mouth of the Rio Grande River in New Mexico and throughout the United States and being

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fully advised thereby, doth take judicial notice of the fact and doth thereby determine that the Rio Grande River is not navigable within the Territory of New Mexico, and doth find as a matter of law that said amended bill does not state a case entitling the complainant to the relief asked for in the prayer of said amended bill and that the same is without equity and the complainant having further declined to amend said bill: The court doth order, adjudge and decree, that the said injunction, heretofore issued herein, be dissolved and that said cause be, and the same hereby is, dismissed, and that the defendants have and recover their reasonable costs herein to be taxed against complainant."

An appeal was taken to the Supreme Court of the Territory, which, on January 5, 1898, affirmed the decree. From this affirmance the United States appealed to this court.

Mr. Attorney General for appellant.

Mr. J. H. McGowan for appellee.

MR. JUSTICE BREWER, after making the foregoing statement, delivered the opinion of the court.

The first question is as to the scope of the decision of the trial court and what is, therefore, presented to us for consideration. Was this a final hearing upon pleadings alone, with all the facts alleged in the answer admitted to be true, or a final hearing upon pleadings and proofs with the decree in effect finding the truth of those facts? Without stopping to inquire whether the record shows a strict compliance with the technical rules of equity procedure, we think the terms of the final order or decree, as well as the language of the opinion filed by the trial judge, clearly disclose what he decided, and what, therefore, is presented to this court for review. It appears that no depositions were taken. Certain affidavits and documents were filed, matter proper for presentation on an application for the continuance or dissolution of a temporary injunction. The final order or decree enumerates

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the different motions, and adds that the court having heard the arguments of counsel and having read the affidavits, etc., "doth take judicial notice of the fact and doth thereby determine that the Rio Grande River is not navigable within the Territory of New Mexico, and doth find as a matter of law that said amended bill does not state a case entitling the complainant to the relief asked for in the prayer of said amended bill, and that the same is without equity, and the complainant having further declined to amend said bill," the injunction is dissolved and the bill dismissed.

Obviously, the only matter of fact which the court attempted to determine (and that determination appears to have been based partly upon the affidavits and documents filed and partly upon judicial notice) was that the Rio Grande River was not navigable within the limits of the Territory of New Mexico, and, so determining, it adjudged and decreed that the complainant's bill was without equity. In other words, finding that the Rio Grande River was not navigable within the limits of the Territory of New Mexico, and that the averments of the bill in that respect were not true, it held that, conceding all the other averments of the bill to be true, the plaintiff was not entitled to relief.

The Supreme Court of the Territory, as appears from its opinion, held that the Rio Grande River was not navigable within the limits of the Territory of New Mexico; that, therefore, the United States had no jurisdiction over the stream, and that, assuming its non-navigability within the limits of the Territory, the plaintiff was not, under the other facts set forth in the bill, entitled to any relief. Whatever criticisms may be expressed as to the form in which the proceedings were had and the decree entered, these distinctly appear as the matters decided by the trial and Supreme Courts, and to them, therefore, our inquiry should run.

The trial court assumed to take judicial notice that the Rio Grande was not navigable within the limits of New Mexico. The right to do this was conceded by the counsel of the Government, on the hearing below, a concession which the Attorney General, on the argument before us, declined to

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continue. The extent to which judicial notice will go is not, in all cases, perfectly clear. There are indisputably certain matters as to which there is a legal imputation of knowledge. In Greenleaf on Evidence, secs. 4, 5 and 6, the author enumerates many of these. Further, he adds as a general proposition: "In fine, courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction." *Brown v. Piper*, 91 U. S. 37. While this will undoubtedly be accepted as an accurate statement of the law, it is obvious that there might be, and in fact there is, much difficulty in determining what ought to be generally known. So that the application of this rule has, as might be expected, led to some conflict in the authorities.

It was said in *The Apollon*, 9 Wheat. 362-374: "It has been very justly observed at the bar that the court is bound to take notice of public facts and geographical positions." In *Peyroux v. Howard et al.*, 7 Pet. 324, the court held that it was "authorized judicially to notice the situation of New Orleans for the purpose of determining whether the tide ebbs and flows as high up the river as that place." In *The Montello*, 11 Wall. 411-414, it was observed: "We are supposed to know judicially the principal features of the geography of our country, and, as a part of it, what streams are public navigable waters of the United States." But the force of this general statement is qualified by the declaration at the close of the opinion: "As the decree must be reversed and the cause remanded to the court below for further proceedings, the parties will be able to present, by new allegations and evidence, the precise character of Fox River as a navigable stream, and not leave the matter to be inferred by construction from an imperfect pleading."

This case came again to this court, 20 Wall. 430, and the record there discloses that testimony was introduced on the second hearing for the purpose of throwing light on the question of navigability.

In *Wood v. Fowler*, 26 Kansas, 682-687, the Supreme Court of that State said: "Indeed, it would seem absurd to require evidence as to that which every man of common

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information must know. To attempt to prove that the Mississippi or the Missouri is a navigable stream would seem an insult to the intelligence of the court. The presumption of general knowledge weakens as we pass to smaller and less known streams; and yet, within the limits of any State the navigability of its largest rivers ought to be generally known, and the courts may properly assume it to be a matter of general knowledge and take judicial notice thereof."

It is reasonable that the courts take judicial notice that certain rivers are navigable and others not, for these are matters of general knowledge. But it is not so clear that it can fairly be said, in respect to a river known to be navigable, that it is, or ought to be, a matter of common knowledge at what particular place between its mouth and its source navigability ceases. And so it may well be doubted whether the courts will take judicial notice of that fact. It would seem that such a matter was one requiring evidence, and to be determined by proof. That the Rio Grande, speaking generally, is a navigable river is clearly shown by the affidavits. It is also a matter of common knowledge, and therefore the courts may properly take judicial notice of that fact. But how many know how far up the stream navigability extends? Can it be said to be a matter of general knowledge, or one that ought to be generally known? If not, it should be determined by evidence. Examining the affidavits and other evidence introduced in this case, it is clear to us that the Rio Grande is not navigable within the limits of the Territory of New Mexico. The mere fact that logs, poles and rafts are floated down a stream occasionally and in times of high water does not make it a navigable river. It was said in *The Montello*, 20 Wall. 430, 439, "that those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water." And again (p. 442): "It is not, however, as Chief Justice Shaw said, 21 Pickering, 344, 'every small creek in

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which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'"

Obviously, the Rio Grande within the limits of New Mexico is not a stream over which in its ordinary condition trade and travel can be conducted in the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. It is not like the Fox River, which was considered in *The Montello*, in which was an abundant flow of water and a general capacity for navigation along its entire length, and although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream in its ordinary condition susceptible of use for general navigation purposes. We are not, therefore, disposed to question the conclusion reached by the trial court and the Supreme Court of the Territory, that the Rio Grande within the limits of New Mexico is not navigable.

Neither is it necessary to consider the treaty stipulations between this country and Mexico. It is true that the Rio Grande, for several hundred miles above its mouth, forms the boundary between this country and Mexico, and that the seventh article of the treaty between the United States and Mexico of February 2, 1848, 9 Stat. 928, stipulates that "the River Gila and the part of the Rio Bravo del Norte lying below the southern boundary of New Mexico being, agreeably to the fifth article, divided in the middle between the two Republics, the navigation of the Gila and of the Bravo below said boundary shall be free and common to the vessels and citizens of both countries, and neither shall, without the consent of the other, construct any work that may impede or interrupt, in whole or in part, the exercise of this right, not even for the purpose of favoring new methods of navigation. . . . The stipulations contained in the present article shall

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not impair the territorial rights of either Republic within its established limits." But by the fourth article of the Gadsden treaty of December 30, 1853, 10 Stat. 1034, it was provided that "the several provisions, stipulations and restrictions contained in the seventh article of the treaty of Guadalupe Hidalgo shall remain in force only so far as regards the Rio Bravo del Norte, below the initial of the said boundary provided in the first article of this treaty, that is to say, below the intersection of the 31st degree 47' 30" parallel of latitude, with the boundary line established by the late treaty dividing said river from its mouth upwards, according to the fifth article of the treaty of Guadalupe." And on December 26, 1890, a convention was concluded between the United States and Mexico, 26 Stat. 1512, which provided for an international boundary commission, to which was given, by article five, the power to inquire, upon complaint of the local authorities, whether works were being constructed in the Rio Grande prohibited by any prior treaty stipulations. There is no suggestion in the bill that any action by these commissioners was invoked, although it appears from one of the affidavits that the commission has been duly constituted. Now it is debated by counsel whether the construction of a dam at the place named in New Mexico, a place wholly within the territorial jurisdiction of the United States, is a violation of any of the treaty stipulations above referred to—they being, primarily at least, limited to that portion of the river which forms the boundary line between the two nations; and also whether the fact that the Rio Grande is partially within the limits of Mexico, would give that nation, under the rules of international law, any right to complain of the total appropriation of its waters for legitimate uses of the people of the United States. Such questions might under some circumstances be interesting and important; but here the Rio Grande, so far as it is a navigable stream, lies as much within the territory of the United States as in that of Mexico, it being where navigable the boundary between the two nations, and the middle of the channel being the dividing line. Now, the obligations of the United States to preserve for their own citizens, the

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navigability of its navigable waters, is certainly as great as any arising by treaty or international law to other nations or their citizens, and if the proposed dam and appropriation of the waters of the Rio Grande constitute a breach of treaty obligations or of international duty to Mexico, they also constitute an equal injury and wrong to the people of the United States.

We may, therefore, properly limit our inquiry to the effect of the proposed dam and appropriation of waters upon the navigability of the Rio Grande, and, in case such proposed action tends to destroy such navigability, the extent of the right of the Government to interfere. The intended construction of the dam and impounding of the water are charged in the bill and admitted in the answer. The bill further charges that the purpose is to obtain control of the entire flow of the river, and divert and use it for irrigation and supplying waters for municipal and manufacturing uses; that, by reason of the porous soil, the dry atmosphere and consequent rapid evaporation, but little water thus taken from the river and distributed over the surface of the earth will ever be returned to the river, and that this appropriation of the waters will so deplete and prevent the flow of water through the channel of the river below the dam as to seriously obstruct the navigable capacity of the river throughout its entire course even to its mouth. The answer, while denying an intent to appropriate all the waters of the Rio Grande, states that the entire flow, during the irrigation season, at the point where defendants propose to construct reservoirs, had long since been diverted, and was owned and beneficially used by parties other than defendants, that they did not seek to disturb such appropriation, but that their sole intention was to appropriate only such waters as had not already been legally appropriated, and that the beneficial rights to be acquired in the stream by virtue of the structures would be very largely only so acquired from the excess, storm and flood waters now unappropriated, useless and going to waste. In other words, the bill charges that the defendants, at the places where they proposed to construct their dam,

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intend thereby to appropriate all the waters of the Rio Grande, and defendants qualify that charge only so far as they say that most of the flow of the river is already appropriated, and they only propose to take the balance. The bill charges that such appropriation of the entire flow will seriously obstruct the navigability of the river from the place of the dam to the mouth of the stream. The defendants deny this, but as the court found that there was no equity in the bill, and dismissed the suit on that ground, we must for the purposes of this inquiry assume that it is true, that defendants are intending to appropriate the entire unappropriated flow of the Rio Grande at the place where they propose to construct their dam, and that such appropriation will seriously affect the navigability of the river where it is now navigable. The right to do this is claimed by defendants and denied by the Government, and that, generally speaking, is the question presented for our consideration.

The unquestioned rule of the common law was that every riparian owner was entitled to the continued natural flow of the stream. It is enough, without other citations or quotations, to quote the language of Chancellor Kent, 3 Kent Com. § 439:

"Every proprietor of lands on the banks of a river has naturally an equal right to the use of the water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*) without diminution or alteration. No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. *Aqua currit et debet currere ut currere solebat* is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it, or give it another direction, and he must return it to its ordinary channel when it leaves his estate."

While this is undoubted, and the rule obtains in those States in the Union which have simply adopted the common law, it is also true that as to every stream within its dominion

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a State may change this common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise. Whether this power to change the common law rule and permit any specific and separate appropriation of the waters of a stream belongs also to the legislature of a Territory, we do not deem it necessary for the purposes of this case to inquire. We concede *arguendo* that it does.

Although this power of changing the common law rule as to streams within its dominion undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any state action. It is true there have been frequent decisions recognizing the power of the State, in the absence of Congressional legislation, to assume control of even navigable waters within its limits to the extent of creating dams, booms, bridges and other matters which operate as obstructions to navigability. The power of the State to thus legislate for the interests of its own citizens is conceded, and until in some way Congress asserts its superior power, and the necessity of preserving the general interests of the people of all the States, it is assumed that state action, although involving temporarily an obstruction to the free navigability of a stream, is not subject to challenge. A long list of cases to this effect can be found in the reports of this court. See among others the following: *Willson v. Black Bird Creek Co.*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Escanaba Co. v. Chicago*, 107 U. S. 678; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1.

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All this proceeds upon the thought that the non-action of Congress carries with it an implied assent to the action taken by the State.

Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the Western States an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain States, the reclamation of arid lands in others, compelled a departure from the common law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands, and there has come to be recognized in those States, by custom and by state legislation, a different rule — a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as those rules have only a local significance, and affect only questions between citizens of the State, nothing is presented which calls for any consideration by the Federal courts. In 1866 Congress passed the Act of July 26, 1866, c. 262, § 9, 14 Stat. 253; Rev. Stat. § 2339:

“Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.”

The effect of this statute was to recognize, so far as the United States are concerned, the validity of the local customs, laws and decisions of courts in respect to the appropriation of water. In respect to this, in *Broder v. Water Company*, 101 U. S. 274, 276, it was said:

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"It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the Government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a preëxisting right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

March 3, 1877, an Act, c. 107, was passed for the sale of desert lands, which contained in its first section this proviso, 19 Stat. 377:

"*Provided, however,* That the right to the use of water by the persons so conducting the same on or to any tract of desert land of six hundred and forty acres shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights."

On March 3, 1891, an Act, c. 561, was passed repealing a prior act in respect to timber culture, the eighteenth section of which provided, 26 Stat. 1101:

"That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its

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laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigability, is to carry those statutes beyond what their fair import permits. This legislation must be interpreted in the light of existing facts—that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries. To hold that Congress, by these acts, meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation

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and carries the statute to the verge of the letter and far beyond what under the circumstances of the case must be held to have been the intent of Congress.

But whatever may be said as to the true intent and scope of these various statutes, we have before us the legislation of 1890. On September 19, 1890, an Act, c. 907, was passed containing this provision, 26 Stat. 454, § 10 :

“That the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offence, and each week's continuance of any such obstruction shall be deemed a separate offence. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction in this act mentioned, or who shall violate the provisions of the last four preceding sections of this act, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court; the creating or continuing of any unlawful obstruction in this act mentioned may be prevented, and such obstruction may be caused to be removed by the injunction of any Circuit Court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States.”

As this is a later declaration of Congress, so far as it modifies any privileges or rights conferred by prior statutes it must be held controlling, at least as to any rights attempted to be created since its passage; and all the proceedings of the appellees in this case were subsequent to this act. This act declares that “the creation of any obstruction, not affirmatively authorized by law to the navigable capacity of any

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waters in respect to which the United States has jurisdiction, is hereby prohibited." Whatever may be said in reference to obstructions existing at the time of the passage of the act, under the authority of state statutes, it is obvious that Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent. It did not, of course, disturb any of the provisions of prior statutes in respect to the mere appropriation of water of non-navigable streams in disregard of the old common law rule of continuous flow, and its only purpose, as is obvious, was to affirm that as to navigable waters nothing should be done to obstruct their navigability without the assent of the National Government. It was an exercise by Congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams; and various sections in this statute, as well as in the act of July 13, 1892, c. 158, 27 Stat. 88, 110, provide for the mode of asserting that control. It is urged that the true construction of this act limits its applicability to obstructions in the navigable portion of a navigable stream, and that as it appears that although the Rio Grande may be navigable for a certain distance above its mouth, it is not navigable in the Territory of New Mexico, this statute has no applicability. The language is general, and must be given full scope. It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the United States which tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition. Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government, enacted the statute in question. And it would be to improperly ignore the scope of this language to limit it to the acts done within the very limits of navigation of a navigable stream.

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The creation of any such obstruction may be enjoined, according to the last provision of the section, by proper proceedings in equity under the direction of the Attorney General of the United States, and it was in pursuance of this clause that these proceedings were commenced. Of course, when such proceedings are instituted it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that is, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the Attorney General to restrain any appropriation of the upper waters of a navigable stream. The question always is one of fact, whether such appropriation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson River runs within the limits of the State of New York. It is a navigable stream and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a non-navigable stream. Its waters are taken by the State of New York for domestic uses in the city of New York. Unquestionably the State of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such appropriation be unquestioned; and within the purview of this section it would become the right of the Attorney General to institute proceedings to restrain such appropriation.

Without pursuing this inquiry further we are of the opinion

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that there was error in the conclusions of the lower courts; that the decree must be

Reversed and the case remanded with instructions to set aside the decree of dismissal, and to order an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability, and if so, to enter a decree restraining those acts to the extent that they will so diminish.

MR. JUSTICE GRAY and MR. JUSTICE McKENNA were not present at the argument, and took no part in the decision.